ONTARIO
LABOUR RELATIONS BOARD
REPORTS

May/June 2006

Ontario

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LABOUR RELATIONS BOARD
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A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [2006] OLRB REP. MAY/JUNE

EDITORS: VOY STELMASZYNSKI
LEONARD MARVY

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

CASES REPORTED

PAGE

1. 1229026 Ontario Inc. c.o.b. as Place Mont Roc; Re United Steelworkers, Local 1-1000 307

2. Andrew Birnie et al; Re National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 222; Re ACSYS 317

3. Cornwall Gravel Co. Ltd.; Re Labourers' International Union of North America, Local 527 332

4. Eastway Construction Ltd.; Re Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America 341

5. E.S. Fox Ltd.; Re UA 353

6. John Boddy Developments Ltd.; Re LIUNA Local 183 360

7. K2 Electrical Contracting Ltd.; Re IBEW, Local 105 375

8. L & L Painting and Decorating Ltd.; Re The International Unions of Painters and Allied Trades, Local 557 385

9. National Fast Freight; Re Karl M. Ellison and Director of Employment Standards ... 389

10. Ontario Lottery and Gaming Corporation c.o.b. as The Slots at Fort Erie Racetrack; Re Michael Mclellan; Re OPSEU Local 278 399

11. PRE ENG Contracting; Re Construction Workers Local 52, affiliated with the Christian Labour Association of Canada 407

12. Rainbow Concrete Industries Ltd.; Re International Union of Operating Engineers, Local 793 409

13. Stephane Verreault; Re Teamsters Union Local 419; Re UA Local 787 413

14. TCS Express Inc.; Re Robina Yasin and Director of Employment Standards 424

15. Thyssenkrupp Elevator (Canada) Limited; Re IUEC, Local 50 431

16. Toronto Transit Commission; Re Amalgamated Transit Union, Local 113; Re Mike Smith et al 438

17. Toronto Transit Commission; Re Amalgamated Transit Union, Local 113; Re Mike Smith et al 439

18. United Lumber & Building Supplies Co. Ltd.; Re Douglas West 441

19. Université d'Ottawa : Re Association des employe(e)s de l'Université d'Ottawa [AEUO] 444

COURT PROCEEDINGS

1. Mississaugas of Scugog Island First Nation; Re National Automobile Aerospace Transportation and General Workers Union of Canada (CAW-Canada) and its Local 444, Great Blue Heron Gaming Company and OLRB 450

2. Greater Essex County District School Board; Re International Brotherhood of Electrical Workers, Local 773 et al 473

3. Jamal, Naseem; Re Ontario Public Service Employees Union and OLRB 474

SUBJECT INDEX

Bargaining Rights – Employer Initiation – Termination – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS THE SLOTS AT FORT ERIE RACETRACK; RE MICHAEL MCLELLAN; RE OPSEU LOCAL 278 399

Bargaining Unit – Certification – Construction Industry – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA........ 341

Certification – Bargaining Unit – Construction Industry – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the

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EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA........................ 341

Certification – Construction Industry – Membership Evidence – Practice and Procedure – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA.... 407

Certification – Construction Industry – Practice and Procedure – Reconsideration – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183............................ 360

Certification – Employer Support – Representation Vote – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA RE: ASSOCIATION DES EMPLOYE(E)S DE L'UNIVERSITÉ D'OTTAWA [AEUO] 444

Certification – Practice and Procedure – Status – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked additional questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 409

Certification Where Act Contravened – Construction Industry – Unfair Labour Practice – The certification and the ULP applications both indicated that the union might seek relief to be certified under section 11 of the Act – The employer made a motion on the first day of hearing to have the Board "strike" the reference to section 11 on both applications, arguing that once a trade union has made an application under section 128.1 it cannot "convert" the application to one brought pursuant to section 8 of the Act – The Board found it does have the power, pursuant to Rule 40.5, to permit an applicant to amend its application – The applicant must provide the Board with a reason to exercise its discretion – Whether the Board will permit a party to amend its application is a question of prejudice to other parties in the case and must be determined at the time the request is made – As the applicant was not seeking such an amendment at the time, the decision dealt only with whether an amendment to an application is available – Matter continues

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 557 385

Consent to Prosecute – Contempt – Unfair Labour Practice – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

1229026 ONTARIO INC. C.O.B. AS PLACE MONT ROC; RE UNITED STEELWORKERS, LOCAL 1-1000 307

Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB.. 450

Construction Industry – Bargaining Unit – Certification – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

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L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 557 385

Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Related Employer – Sale of Business – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al. 473

Construction Industry Grievance – Discharge – Practice and Procedure – The applicant grieved the discharge of two employees who were fired for allegedly smoking marijuana during their lunch break – The respondent sought to admit videotape surveillance it alleged depicted the grievors smoking marijuana in their truck located offsite of the employer's property – The applicant opposed the admission of the videotape on the basis that it violated the grievors' right to privacy and because the videotape was not produced in a timely manner – The Board considered two lines of arbitral authority on the admission of videotape surveillance: admission where the surveillance is relevant and admission where the surveillance is not conducted unreasonably or for an unreasonable purpose – The Board adopted the reasonableness test and found the surveillance was unreasonable for lack of sufficient motivation – A "feeling" that something is not right is no substitute for clear and reasonable grounds when employees are off duty and away from the worksite – The respondent had a less intrusive alternative to surveillance because it had an opportunity to observe the grievors' work performance but failed to observe such performance – Finally, there was a reasonable expectation of privacy because the grievors were in their own vehicle – On the issue of delay of production, the Board held it was open to counsel to obtain a production order – Matter continues

THYSSENKRUPP ELEVATOR (CANADA) LIMITED; RE IUEC, LOCAL 50 431

Construction Industry Grievance – Human Rights Code – The applicant grieved the employer's refusal to accept a referral to work of an employee over the age of 65 – The employer argued that it had established a policy not to "hire or employ" individuals over the age of 65 in November 2004 – The applicant argued that the employer did not consistently apply its policy (the employer had not required any employee who turned 65 to leave the workplace), therefore its application of the policy to the grievor was arbitrary, discriminatory or unreasonable – The Board considered the recent amendments to the Ontario *Human Rights Code* (eliminating mandatory retirement), passed in December 2005 but only coming into effect in December 2006 – Even in the absence of the recent legislative amendments, the Board would have found the employer's actions discriminatory since the policy was not uniformly applied – Grievance allowed

E.S. FOX LTD.; RE UA 353

Contempt – Consent to Prosecute –Unfair Labour Practice – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

1229026 ONTARIO INC. C.O.B. AS PLACE MONT ROC; RE UNITED STEELWORKERS, LOCAL 1-1000 307

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THYSSENKRUPP ELEVATOR (CANADA) LIMITED; RE IUEC, LOCAL 50 431

Discharge – Duty of Fair Representation – The applicant alleged the union breached section 74 in connection with its failure to properly represent him in three terminations – The Board found the union did not violate the Act when it made decisions that were advantageous to the applicant – The union acted reasonably when it accepted the employer's offer to compensate the applicant between hearings for the applicant's second and third terminations; when it advised the applicant to accept an agreed statement of facts at arbitration; and when it entered into a Letter of Understanding with the employer – In its assessment of whether section 74 had been breached, the Board considered the grievor's conduct and found the applicant was uncooperative and antagonistic towards the union so as to irreparably fracture their relationship – Moreover, the applicant began to disregard the union's instructions and posted notices on the union's website alleging that the union business manager was stealing from the employer – When the union ordered the applicant to remove the postings the applicant ignored the union's warnings – The Board held that where a grievor fails to cooperate with a union, so that the union is unable to productively work with the grievor, or is unable to properly prepare for an arbitration, the union may, in extreme cases, be entitled to withdraw from the grievance – Application dismissed

STEPHANE VERREAULT; RE TEAMSTERS UNION LOCAL 419; RE UA LOCAL 787 413

Discharge – Duty of Fair Representation – The applicants challenged their union's settlement of discharge grievances without their consent – After an exhaustive investigation including video surveillance and computer intervention, the employer discharged the applicants for time theft and misuse of company property (the applicants were alleged to have contributed to an alternative workplace website which contained disparaging and false comments regarding the employer and its employees) – The applicants maintained their innocence and objected to any settlement overtures – The Board held that a s. 74 application is not a substitute for arbitration; the process is not a forum for assessing the correctness of the union's decisions, and the trade union is well within its rights to settle a grievance absent the grievor's consent – Finally, the Board found no violation of s. 87 of the Act when the union discontinued an internal appeal once the applicants had launched the instant complaint – Application dismissed

ANDREW BIRNIE et al; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 222; RE ACSYS AUTOMOTIVE COMPONENT SYSTEMS OF CANADA A DIVISION OF BBK, MICHIGAN 317

Discharge – Employment Standards – Reprisal – The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

NATIONAL FAST FREIGHT; RE KARL M. ELLISON AND DIRECTOR OF EMPLOYMENT STANDARDS.. 389

Discharge – Interim Relief – Unfair Labour Practice – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic – Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

K2 ELECTRICAL CONTRACTING LTD.; RE IBEW, LOCAL 105 375

Discharge – Interim Relief – Unfair Labour Practice – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

CORNWALL GRAVEL CO. LTD.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527... 332

Duty of Fair Representation – Discharge – The applicant alleged the union breached section 74 in connection with its failure to properly represent him in three terminations – The Board found the union did not violate the Act when it made decisions that were advantageous to the applicant – The union acted reasonably when it accepted the employer's offer to compensate the applicant between hearings for the applicant's

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ANDREW BIRNIE et al; RE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 222; RE ACSYS AUTOMOTIVE COMPONENT SYSTEMS OF CANADA A DIVISION OF BBK, MICHIGAN 317

Duty of Fair Representation – Judicial Review – The Court held that a dismissal of a duty of fair representation complaint for delay was subject to a standard of patent unreasonableness – The Board's unpublished rule of thumb regarding delay was presumptive only, and the Board gave consideration to applicable criteria – There was nothing clearly irrational or so flawed in the Board's ruling to cause the Court to interfere with the decision – Application dismissed – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

JAMAL, NASEEM; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND THE OLRB 474

Employer Initiation – Bargaining Rights – Termination – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not

conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS THE SLOTS AT FORT ERIE RACETRACK; RE MICHAEL MCLELLAN; RE OPSEU LOCAL 278 399

Employer Support – Certification – Representation Vote – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA : RE : ASSOCIATION DES EMPLOYE(E)S DE L'UNIVERSITÉ D'OTTAWA [AEUO] 444

Employment Standards – Discharge – Reprisal – The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

NATIONAL FAST FREIGHT; RE KARL M. ELLISON AND DIRECTOR OF EMPLOYMENT STANDARDS 389

Employment Standards – The employer claimed that the respondent was not entitled to overtime since she failed to observe the company's policy, which prohibited employees from engaging in work beyond the regular work period, and required authorization from the supervisor for any overtime – The employer also argued that the Employment Standards Officer should not have considered meal periods in any calculation of overtime – The respondent claimed that she repeatedly obtained verbal permission to do overtime work, and did not receive an uninterrupted lunch period throughout the course of her employment – The Board determined that, in light of subsection 6(1) of *O. Reg. 285/01*, the applicant's policy on overtime did not exclude the respondent from obtaining accumulated overtime pay – The Board found that it was appropriate to include in the overtime calculation that period of time where the respondent did not have the opportunity to take an uninterrupted meal period – Application granted, in part

TCS EXPRESS INC.; RE ROBINA YASIN AND DIRECTOR OF EMPLOYMENT STANDARDS 424

Health and Safety – The applicant employer appealed and sought a suspension of an Order requiring it to provide a readily available hard copy of material safety data sheets

(MSDS) to all workers who are potentially at risk of exposure to hazardous materials – In its submissions on the suspension request, the employer argued that the workers have easy access to MSDS through a CD-Rom program and computer system; that it would be too onerous to maintain, regularly update and locate correct MSDS using a hard copy version; and that whatever retrieval problems existed with the computer system had been corrected since the Inspector's visit – An employee member of the Joint Health and Safety Committee filed a response in support of the employer's position, submitting that the current CD-Rom program is more time efficient and accessible for workers than the prospect of searching through the hard copy for MSDS – The Board found that the employer would suffer harm if it was required to comply with the Order pending the appeal; the suspension of the Order would not endanger worker safety because the company's retrieval system appeared to allow workers to quickly access the correct MSDS; and the applicant had *prima facie* grounds for a successful appeal – Suspension request granted

UNITED LUMBER & BUILDING SUPPLIES CO. LTD.; RE DOUGLAS WEST, INSPECTOR 441

Human Rights Code – Construction Industry Grievance – The applicant grieved the employer's refusal to accept a referral to work of an employee over the age of 65 – The employer argued that it had established a policy not to "hire or employ" individuals over the age of 65 in November 2004 – The applicant argued that the employer did not consistently apply its policy (the employer had not required any employee who turned 65 to leave the workplace), therefore its application of the policy to the grievor was arbitrary, discriminatory or unreasonable – The Board considered the recent amendments to the Ontario *Human Rights Code* (eliminating mandatory retirement), passed in December 2005 but only coming into effect in December 2006 – Even in the absence of the recent legislative amendments, the Board would have found the employer's actions discriminatory since the policy was not uniformly applied – Grievance allowed

E.S. FOX LTD.; RE UA 353

Interim Relief – Constitutional Law – Intervenor – Judicial Review – Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS

UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 450

Interim Relief – Discharge – Unfair Labour Practice – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic – Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

K2 ELECTRICAL CONTRACTING LTD.; RE IBEW, LOCAL 105 375

Interim Relief – Discharge –Unfair Labour Practice – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

CORNWALL GRAVEL CO. LTD.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527 332

Intervenor – Constitutional Law – Interim Relief – Judicial Review – Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 450

Judicial Review – Constitutional Law – Interim Relief – Intervenor –Reference – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 450

Judicial Review – Construction Industry – Public Sector Labour Relations Transition Act – Related Employer – Sale of Business – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al. 473

Judicial Review – Duty of Fair Representation – The Court held that a dismissal of a duty of fair representation complaint for delay was subject to a standard of patent unreasonableness – The Board's unpublished rule of thumb regarding delay was presumptive only, and the Board gave consideration to applicable criteria – There was nothing clearly irrational or so flawed in the Board's ruling to cause the Court to interfere with the decision – Application dismissed – Leave to appeal to Court of Appeal dismissed – Leave to appeal to Supreme Court of Canada dismissed

JAMAL, NASEEM; RE ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND THE OLRB.. 474

Lock-Out – Strike – Reconsideration – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al.. 438

Membership Evidence – Certification – Construction Industry – Practice and Procedure – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA.... 407

Practice and Procedure – Certification – Construction Industry – Reconsideration – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183 360

Practice and Procedure – Certification – Construction Industry – Membership Evidence – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

PRE ENG CONTRACTING; RE CONSTRUCTION WORKERS LOCAL 52, AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA 407

Practice and Procedure – Certification – Status – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked additional questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 409

Practice and Procedure – Discharge – Construction Industry Grievance – The applicant grieved the discharge of two employees who were fired for allegedly smoking marijuana during their lunch break – The respondent sought to admit videotape surveillance it alleged depicted the grievors smoking marijuana in their truck located offsite of the employer's property – The applicant opposed the admission of the videotape on the basis that it violated the grievors' right to privacy and because the videotape was not produced in a timely manner – The Board considered two lines of arbitral authority on the admission of videotape surveillance: admission where the surveillance is relevant and admission where the surveillance is not conducted unreasonably or for an unreasonable purpose – The Board adopted the reasonableness test and found the surveillance was unreasonable for lack of sufficient motivation – A "feeling" that something is not right is no substitute for clear and reasonable grounds when employees are off duty and away from the worksite – The respondent had a less intrusive alternative to surveillance because it had an opportunity to observe the grievors' work performance but failed to observe such performance – Finally, there was a reasonable expectation of privacy because the grievors were in their own vehicle – On the issue of delay of production, the Board held it was open to counsel to obtain a production order – Matter continues

THYSSENKRUPP ELEVATOR (CANADA) LIMITED; RE IUEC, LOCAL 50 431

Practice and Procedure – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift

– The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike

TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113; RE MIKE SMITH et al 438

Public Sector Labour Relations Transition Act – Construction Industry – Judicial Review – Related Employer – Sale of Business – Stay – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al 473

Reconsideration – Certification – Construction Industry – Practice and Procedure – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183 360

Reconsideration – Lock-Out – Strike – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al.. 438

Reference – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Unfair Labour Practice – The Board considered whether certain provisions of the *Labour Relations Act, 1995* are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB.. 450

Related Employer – Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Sale of Business – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al.. 473

Representation Vote - Certification – Employer Support – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant - The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA: RE: ASSOCIATION DES EMPLOYE(E)S DE L'UNIVERSITÉ D'OTTAWA [AEUO].. 444

Reprisal – Discharge - Employment Standards - The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

NATIONAL FAST FREIGHT; RE KARL M. ELLISON AND DIRECTOR OF EMPLOYMENT STANDARDS.. 389

Sale of Business – Construction Industry - Judicial Review – Public Sector Labour Relations Transition Act – Related Employer – Stay –The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al. 473

Sector Determination – Bargaining Unit – Certification – Construction Industry – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA........................ 341

Status – Bargaining Unit – Certification – Construction Industry – Sector Determination – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

EASTWAY CONSTRUCTION LTD.; RE CENTRAL ONTARIO REGIONAL COUNCIL OF CARPENTERS, DRYWALL AND ALLIED WORKERS UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA........................ 341

Status – Certification – Construction Industry – Practice and Procedure – Reconsideration – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

JOHN BODDY DEVELOPMENTS LTD.; RE LIUNA LOCAL 183............................ 360

Status – Certification – Practice and Procedure – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked additional questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

RAINBOW CONCRETE INDUSTRIES LTD.; RE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 793 409

Stay – Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Related Employer – Sale of Business – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the *PSLRTA* – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 773 et al. 473

Strike – Lock-Out – Reconsideration – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113, MIKE SMITH et al. 439

Strike – Practice and Procedure – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike

TORONTO TRANSIT COMMISSION; RE AMALGAMATED TRANSIT UNION, LOCAL 113; RE MIKE SMITH et al 439

Termination – Bargaining Rights – Employer Initiation – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

ONTARIO LOTTERY AND GAMING CORPORATION C.O.B. AS THE SLOTS AT FORT ERIE RACETRACK; RE MICHAEL MCLELLAN; RE OPSEU LOCAL 278 399

Trade Union – Certification – Employer Support – Representation Vote – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

UNIVERSITÉ D'OTTAWA; RE: ASSOCIATION DES EMPLOYE(E)S DE L'UNIVERSITÉ D'OTTAWA [AEUO] 444

Unfair Labour Practice – Consent to Prosecute – Contempt – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

1229026 ONTARIO INC. C.O.B. AS PLACE MONT ROC; RE UNITED STEELWORKERS, LOCAL 1-1000 307

Unfair Labour Practice – Constitutional Law – Interim Relief – Intervenor – Judicial Review – Reference – The Board considered whether certain provisions of the *Labour*

Relations Act, 1995 are of no force and effect by reason of either the enactment of a First Nation *Labour Code*, aboriginal or treaty rights, or the First Nation's inherent right to self-government – The Board addressed the concept of aboriginal rights and considered the test to be applied in determining whether a right has been established – Citing *Mitchell v. Minister of National Revenue* [2001] 1 S.C.R. 911, the Board held that the First Nation's attempt at organizing labour in general was not integral to an aboriginal right – Similarly, there were no treaty rights that would permit the First Nation to regulate labour relations, or that would entitle the First Nation to self-government – Constitutional question answered in the negative – Employer is obliged to bargain and the Minister may appoint a conciliator – On judicial review, the Court held that the Board had jurisdiction to decide the question posed by it under s. 35 of the Constitution – The standard of review for the Board's decision on the constitutional question is correctness; for non-constitutional and procedural matters, the standard is patent unreasonableness – The Court held that the Board had correctly framed and characterized the constitutional issue and had correctly concluded that the First Nation had not tendered any evidence to establish an aboriginal or treaty right to regulate labour relations on reserve lands – Further, the court held that the Board had the statutory authority to conduct the proceedings as it did – Application for judicial review dismissed

MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION; RE NATIONAL AUTOMOBILE AEROSPACE TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 444, GREAT BLUE HERON GAMING COMPANY AND OLRB 450

Unfair Labour Practice – Discharge – Interim Relief – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

CORNWALL GRAVEL CO. LTD.; RE LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527 332

Unfair Labour Practice – Discharge – Interim Relief – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic –

Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

K2 ELECTRICAL CONTRACTING LTD.; RE IBEW, LOCAL 105 375

Unfair Labour Practice – Certification Where Act Contravened – Construction Industry – The certification and the ULP applications both indicated that the union might seek relief to be certified under section 11 of the Act – The employer made a motion on the first day of hearing to have the Board "strike" the reference to section 11 on both applications, arguing that once a trade union has made an application under section 128.1 it cannot "convert" the application to one brought pursuant to section 8 of the Act – The Board found it does have the power, pursuant to Rule 40.5, to permit an applicant to amend its application – The applicant must provide the Board with a reason to exercise its discretion – Whether the Board will permit a party to amend its application is a question of prejudice to other parties in the case and must be determined at the time the request is made – As the applicant was not seeking such an amendment at the time, the decision dealt only with whether an amendment to an application is available – Matter continues

L & L PAINTING AND DECORATING LTD.; RE THE INTERNATIONAL UNIONS OF PAINTERS AND ALLIED TRADES, LOCAL 557 385

1684-05-U; 3719-05-U United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 1-1000, Applicant v. **1229026 Ontario Inc., c.o.b. as Place Mont Roc**, Responding Party.

Consent to Prosecute – Contempt – Unfair Labour Practice – The union sought a ruling from the Board that the employer had failed to comply with certain directions issued in the unfair labour practice decision, as well as the Board's consent to initiate a prosecution of the employer for such failure – The Board found that the employer refused to recognize the trade union as the bargaining agent of its employees and failed to acknowledge the legitimacy of the collective bargaining and arbitration process – The employer's continued refusal to provide information to the union to enable it to quantify its damages caused the Board to state a case for contempt and consent to the launching of the prosecution – The Board declined to award legal costs against the employer – Application granted

BEFORE: *Mary Anne McKellar*, Vice-Chair, and Board Members *R. O'Connor* and *R. R. Montague*.

APPEARANCES: *Mark Rowlinson* and *Mike McCarter* appeared for the applicant; *Paul Delacourt* and *Donald Leslie* appeared for the responding party.

DECISION OF VICE-CHAIR MARY ANNE MCKELLAR AND BOARD MEMBER *R. O'Connor*; May 9, 2006

Introduction

1. Board File No. 1684-05-U is an unfair labour practice complaint that was orally decided by the Board at a hearing on December 14, 2005. The Board's written decision issued December 19, 2005. This decision deals, in part, with the applicant union's ("the Union's") request that the Board state a case for contempt against the respondent employer ("the Employer") in respect of its alleged failure to comply with certain directions contained in the December 19, 2005 decision. It also deals with the Union's request that the Board quantify the amount of the union dues and education fund contributions that the December 19, 2005 decision had directed the Employer to pay.

2. Board File No. 3719-05-U is an application for consent to prosecute the Employer in respect of its alleged commission of an offence under the *Labour Relations Act, 1995* ("the Act"), namely its alleged failure to comply with the directions issued by the Board and set out in the December 19, 2005 decision.

3. The parties made submissions in respect of all the above issues at a hearing on April 21, 2006.

Decision and Orders

4. We direct the Employer to pay to the Union the following amounts by no later than May 5, 2006: $1,711.53 in respect of outstanding union dues remittances; and $1,611.29 in respect of outstanding education fund contributions.

5. Pursuant to section 109 of the Act, we hereby consent to the institution of a prosecution against the Employer in respect of the alleged offence of having contravened the directions contained in our December 19, 2005 decision.

6. Pursuant to section 13(1)(c) of the *Statutory Powers Procedure Act* ("SPPA"), we have determined to state a case to the Divisional Court setting out the facts so that the Divisional Court may inquire into whether the Employer has complied with the directions set out in paragraphs 5(c) and 5(e) of our December 19, 2005 decision.

Background to the April 21, 2006 Hearing

7. Board File No. 1684-05-U was filed with the Board on August 24, 2005. The Employer did not file a response to that application, which was the subject of a hearing held December 14, 2005. The Employer's representatives, Messrs. Delacourt and Leslie, attended the hearing. We asked them why, in the absence of a response by the Employer, we should not simply accept all of the facts pleaded by the Union. They did not dispute the facts that the Union had pleaded or that those facts constituted a contravention of the Act, and they agreed that the nature of the remedial relief sought by the Union was appropriate. The Board issued its decision on December 19, 2005. These are the significant portions of that decision:

> 2. The responding party ("the Employer") failed to file a response to the applicant's ("the Union's") application. It advised the Board at the hearing that it did not dispute any of the factual assertions contained in the Union's filed material, nor did it dispute (except to the extent noted below) that the remedial relief sought by the Union (and amplified upon at the hearing) is appropriate.
>
> 3. The Employer acknowledges that it has: (1) failed to prepare and execute a collective agreement implementing the award of an interest arbitrator ("the Surdykowski Award"); (2) failed to pay to its employees the retroactive pay owing to them as a consequence of the Surdykowski Award; (3) contravened the collective agreement by deducting from employees' wages their contributions to health benefit premiums while causing the employees' benefit cards to be cancelled and failing to reimburse any medical expenses incurred as a consequence of that cancellation pursuant to the arbitration award of arbitrator Roach ("the Roach Award"); (4) contravened the collective agreement by deducting union dues from employees' wages but failing to remit them to the Union, despite having been directed to do so pursuant to the arbitration award of arbitrator Szlazak ("the Szlazak Award");

and (5) contravened the collective agreement by failing to remit payments to the Union Education Fund, despite having been directed to do so pursuant to the Szlazak Award.

4. Based on the foregoing facts, we conclude that the Employer has utterly failed to recognize that the Union is the bargaining agent of its employees, and has failed to recognize the legitimacy of the collective bargaining and arbitration process. The Employer's actions constitute a contravention of section 70 of the Act, and we so declare.

5. In accordance with the Union's request for remedial relief, which the Employer (with the exceptions noted below) acknowledged was appropriate in the circumstances, and should issue, we hereby direct the Employer to do the following:

a) Execute and post a Notice to Employees in the form attached as Appendix "A" in the workplace in such conspicuous locations where it may come to the attention of affected employees and keep it posted for 60 days;
b) Mail a copy of the executed Notice to Employees in the form attached as Appendix "A" to any persons employed in the bargaining unit at any time on or after August 1, 2003;

c) Provide the Union within 10 days of the date of this decision with a list of the names, addresses and phone numbers of any individual employed in the bargaining unit at any time on or after August 1, 2003, as well as information respecting each individual's rate of pay and hours worked between August 1, 2003 and February 1, 2005;

d) Pay to the Union forthwith the amounts quantified in the Szlazak Award (dues remittances and Education Fund contributions) as well as any other outstanding Union dues plus interest on those amounts calculated at 5% compounding monthly;

e) Provide the Union within 10 days of the date of this decision with copies of all health claims expenses submitted by employees to the Employer from February 1, 2005;

f) Comply forthwith with the directions set out in the Roach Award respecting the reinstatement of benefits

> and reimbursement of medical expenses incurred as a consequence of the suspension of benefits;
>
> g) Comply with the Surdykowski Award; and
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> h) Distribute to the affected employees by no later than January 10, 2006, at least $16,000 in respect of retroactive pay owing to employees pursuant to the Surdykowski Award.
>
> 6. The Union and the Employer may have a dispute with respect to the amount of retroactive pay that is owing pursuant to the Surdykowski Award. The Employer has conceded that it is at least $16,000, and consequently, that is the amount we have directed it to pay in this decision. Once the directions above have been complied with, the Union should be in a position to ascertain the amount of the outstanding balance, if any. Any outstanding balance should be paid out to employees by no later than January 24, 2006.
>
> 7. The Union sought to recover from the Employer certain costs of its attendance at the hearing before the Board. We declined to order such costs, and did not seek to have the Employer comment on the request.
>
> 8. We remain seized.

8. On February 10, 2006, the Union wrote to the Board seeking to have Board File No. 1684-05-U re-listed for hearing and setting out particulars of the ways in which it alleged that the Employer had failed to comply with the directions contained in paragraphs 5 and 6 of the December 19, 2005 decision. The Union indicated that it would be seeking to have the Board state a case to the Divisional Court for a finding of contempt against the Employer, and that it would be filing a separate application for consent to prosecute. The Union filed its application for Consent to Prosecute, to which the Board assigned File No. 3719-05-U, on February 10, 2006.

9. The Union's letter pertaining to Board File No. 1684-05-U was copied to the Employer, and the application in File No. 3719-05-U was delivered to the Employer. The Registrar of the Board acknowledged receipt of the new application by sending Form B-19 (Confirmation of Application for Consent to Institute Prosecution) to the parties by facsimile on February 13, 2006. Form B-19 alerted the Employer that, pursuant to the Board's Rules, the response to the application was due within 10 days of the date that the application had been delivered to it. Paragraph 7 of Form B-19 also contains the following warning:

> If you do not file your response and other required documentation in the way required by the Board's rules, the Board may not process your response and documents, and may decide the application without further notice to you. Furthermore, you may be deemed to have accepted all the facts stated in the application.

10. By Notice of Hearing dated March 14, 2006, the Registrar listed both these matters for hearing on April 21, 2006.

11. By letter dated March 15, 2006, the Union advised the Board that the Employer had failed to file a response to the application in Board File No. 3719-05-U, and it sought to have the Board decide the application on the material before it pursuant to Rule 2.3 of the Board's Rules of Procedure.

12. We issued a decision dated April 11, 2006 in which we noted the Employer's failure to file a response, and the Union's request that we proceed as contemplated by Rule 2.3. We also reproduced Rule 2.3 in that decision and we summarized the Act's provisions and the Board's jurisprudence respecting Consent to Prosecute Applications. In short, we clearly warned the Employer of the possible consequences of this proceeding, and of the difficult position in which the Employer could find itself as a result of not filing a response. Paragraph 6 of our April 11, 2006 decision reads:

> 6. Notwithstanding the onus that the Board places on the applicant to demonstrate that a criminal prosecution will promote good industrial relations, in the absence of any response by the Employer we have only the Union's materials before us. On their face they state a case that appears to satisfy that onus. Unless the Employer attends the hearing on April 21, 2006 and provides us with a compelling argument as to why we should accept a late response from it, our decision respecting whether to grant consent to the Union's initiation of a prosecution pursuant to section 104 of the Act will be based on the Union's materials only.

13. By letter dated April 18, 2006, the Union sought to amend the application in Board File No. 3719-05-U to add Messrs. Delacourt and Leslie, the individual owners of the Employer, as responding parties. The Employer and those individuals opposed this request by letter dated April 19, 2006.

Scope of the April 21, 2006 Hearing

14. When the hearing convened at 9:30 a.m. on April 21, 2006, the Employer still had not filed a response to the application. Nevertheless, the Employer indicated that it intended to adduce evidence to show that it had complied with (or was in the course of complying with) the Board's directions set out in the December 19, 2005 decision, and outlined briefly what that evidence would be. It was clear that some of the facts that it hoped to establish through that evidence contradicted what the Union asserted had occurred, and that the Union had (not surprisingly) not secured the attendance of witnesses who might speak to those issues. For example, the Employer asserted that it had posted copies of the Notice to Employees in the workplace, while Union counsel stated that he had received e-mails from employees in the workplace advising that the posting had not occurred. The Employer also brought with it and handed to the Union cheques dated April 15, 2006 in respect of the amounts it thought it was obliged to pay to the Union pursuant to paragraph 5(d) of the Board's December 19, 2005 decision.

15. The panel asked the Employer to explain why it had not communicated with the Union or with the Board respecting its alleged efforts to comply with the directions, and why it had not responded to the Union's request that Board File No. 1684-05-U be re-listed for hearing

or filed a response to the new application in Board File No. 3719-05-U. The Employer's explanation was that it had not appreciated that it had to respond prior to meeting with a Labour Relations Officer ("LRO") from the Board, and that it had understood that April 21, 2006 was not scheduled for a hearing, but rather for a meeting. This explanation is simply not believable, and is certainly not compelling. The Board's Rules and Form B-19 clearly communicate that the timeline for filing a response is triggered by the date that an application is delivered to a responding party and has nothing to do with whether or when an LRO meeting is scheduled. In any event, Form B-19 set the LRO's reporting date as March 17, 2006 and the Union asserted in its March 15, 2006 correspondence that the Employer had failed to attend an LRO meeting scheduled for March 10, 2006. That assertion, along with the fact that the Board sent a Notice of Hearing on March 14, 2006 clearly signalled that the next step in this proceeding was a hearing. Indeed, we referred to the scheduled hearing in our April 11, 2006 decision warning of the potential consequences of proceeding to hearing without having filed a response. The documentary record, as well as the fact that this Employer had previously attended a Board hearing (also without having attended the LRO meeting or filing a response), renders the Employer's alleged confusion about whether a meeting or hearing would be held on April 21, 2006, utterly disingenuous. Similarly, we are satisfied that the possible consequences of a failure to file a response were brought home to the Employer repeatedly, and had indeed been the subject of some discussion during the December 14, 2005 hearing into Board File No. 1684-05-U.

16. The Union repeated its request that we proceed on the basis that the Employer be deemed to have accepted all the facts it had pleaded.

17. After hearing all of the parties' representations with respect to how we should proceed, the panel recessed briefly and then returned and delivered the following ruling:

> The Board declines to add Messrs Delacourt and Leslie as respondents to the Consent to Prosecute application in board File No. 3719-05-U.
>
> The respondent Employer (Place Mont Roc) in Board File No. 3719-05-U has not provided us with a compelling explanation as to why we should permit it to adduce evidence to dispute the applicant Union's assertions of fact in view of:
>
> (a) the Employer's failure to file a response to the application; and
>
> (b) the prejudice that would accrue to the Union if compelled to respond to facts not pleaded and which it has not brought witnesses able to speak to.
>
> We grant the Union's request that we proceed in accordance with Rule 2.3 of the Board's Rules of Procedure – i.e. the Employer is deemed to have accepted all the facts stated in the Union's application because of its failure to file a response.

18. As a consequence of the ruling set out above, therefore, the following facts asserted by the Union were deemed to have been accepted by the Employer, and provided the basis on which the parties made their legal submissions.

> a) The Employer did not execute and post a "Notice to Employees" in the workplace as it had been directed to do in paragraph 5(a) of the Board's December 19, 2005 decision, nor did it mail a copy of the executed "Notice to Employees" to persons employed in the bargaining unit after August 1, 2003, as it had been directed to do in paragraph 5(b) of the Board's December 19, 2005 decision.
>
> b) The Employer did not provide to the Union the names, addresses and phone numbers of individuals employed in the bargaining unit at any time on or after August 1, 2003, nor did it provide information respecting each individual's rate of pay and hours worked between August 1, 2003 and February 1, 2005, as it had been directed to do in paragraph 5(c) of the Board's December 19, 2005 decision.
>
> c) The Employer appears to have made some payments of retroactive wages to employees, however it is not clear how much the Employer paid or how it was calculated, and none of the payments were made in accordance with the time frames directed by the Board in paragraphs 5(h) and 6 of its December 19, 2005 decision.
>
> d) The Employer did not pay to the Union the education fund contributions (plus applicable interest) nor did it remit to the Union the dues it had deducted (plus applicable interest) from employees in the bargaining unit in accordance with the award of arbitrator Szlazak, as it had been directed to do in paragraph 5(d) of the Board's December 19, 2005 decision.
>
> e) The Employer did not provide the Union with copies of health claims expenses submitted by employees from February 1, 2005, nor has it reimbursed employees for those expenses (plus applicable interest) and reinstated benefits as directed in the award of arbitrator Roach, all of which it had been directed to do in paragraph 5(e) and (f) of the Board's December 19, 2005 decision.

Legal Submissions

Union's Position

19. With respect to Board File No. 1684-05-U, and more specifically further to our directions in paragraph 5(d) of the December 19, 2005 decision, the Union submitted that we should direct the Employer to pay to the Union $1,711.53 in union dues (including applicable interest) and $1,611.29 in education fund contributions (including applicable interest) in satisfaction of the Szlazak award.

20. The Union also sought to have us direct the Employer to compensate it for the expenses it incurred in having to attend the April 21, 2006 hearing, specifically those disbursements incurred by the local Union president in traveling from the Ottawa Valley to Toronto to attend the hearing. Those disbursements, which were itemized by the Union at the hearing, totalled $1,350.00. The Union did not cite any authorities in support of its position.

21. Further, the Union sought to have us state a case for contempt against this Employer to the Divisional Court pursuant to section 13(1)(c) of the SPPA in respect of its alleged failure to provide the Union with the information necessary to permit it to ascertain the amounts owing to employees in retroactive wages and as a result of the suspension of the benefit plans, information which we had directed the Employer to provide "within 10 days" of our December 19, 2005 decision. In its argument on this point the Union referred to the Board's decision in *Sundial Homes (Bronte) Ltd.*, [2005] O.L.R.D. No. 321 and in *Essex County Board of Education*, [1994] O.L.R.D. No. 1047.

22. Insofar as Board File No. 3719-05-U is concerned, the Union conceded that the Board has granted consent to prosecute only in very exceptional circumstances, and it agreed that the passage we set out from *A.A.S. Telecommunications Ltd.*, [1976] OLRB Rep. Dec. 751 in our April 11, 2006 decision was a useful summary of the Board's approach. On the basis of the facts that the Employer is deemed to have accepted, the Union submitted that it is clear that there has been a *prima facie* contravention of the Board's December 19, 2005 directions such that the statutory prerequisite to the granting of consent to prosecute has been satisfied. The only remaining question in the Union's submission, therefore, is whether the Board should exercise its discretion to grant its consent to institute a prosecution. The Union submitted that we should, and it characterized the Employer's conduct as so flagrant that no remedy short of consent to prosecute would be adequate. It further submitted that labour relations would be advanced by granting our consent because to deny consent would essentially give the Employer license to flout the authority of the Board. The Union submitted that we must send a message to the Employer (and to other employers in the province) that it must deal with the certified bargaining agent of its employees, and it must comply with the Board's orders. In addition to *A.A.S. Telecommunications Ltd.*, the Union also referred in its submissions to *Fleck Manufacturing Company*, [1978] OLRB Rep. July 615; *Millcroft Inn Ltd.*, [2000] OLRB Rep. July/August 665; and *Cooper-Weeks Limited and Jack Cooper*, [1967] OLRB Rep. May 162.

Employer's Position

23. The Employer submitted that its alleged conduct was not flagrant or outrageous, and that it was doing its best to comply with the Board's orders, but simply could not afford to do so earlier. When asked how those financial difficulties prevented it from supplying the Union with the information it had agreed to provide, the Employer submitted that it was busy and its priorities lay elsewhere. The Employer made no specific submissions with respect to whether we should state a case for contempt. It did submit that we should not grant consent to prosecute, on the basis that there was no public purpose to doing so and that the Employer "does not see how prosecution would help this relationship". On this topic, the Employer conceded that the relationship with the Union had been somewhat rocky in the past, but claimed that it had 'turned a corner". The Employer also submitted that an order compensating the Union for the expenses incurred in attending the April 21, 2006 hearing would be extremely unusual and unfair, particularly since the Employer noted that it had never been compensated for attending a grievance arbitration hearing.

Union's Reply

24. The Union's only reply was to note that the Employer has only attended two of the last three grievance arbitration hearings.

Analysis

25. We remained seized in respect of Board File No. 1684-05-U. The Union has now provided us with information on the basis of which we are able to quantify the amounts that the Employer was directed to pay to the Union pursuant to the direction in paragraph 5(d) of our December 19, 2005 decision as $1,711.53 in respect of union dues and $1,611.29 in respect of education fund contributions. We find that it is appropriate to order the Employer to pay those amounts.

26. As noted earlier in this decision, for the purposes of determining the application in Board File No. 3719-05-U and for dealing with issues arising out of our remedial orders in Board File No. 1684-05-U, we deemed the Employer to have accepted all the facts pleaded by the Union, and which we have summarized in paragraph 18 above. The Union requests that we state a case to the Divisional Court based on the facts set out in paragraph 18(b) and (c) of this decision. We agree that it is appropriate to do so. Although the Employer has acknowledged that it owes money to its employees in respect of retroactive wages, medical expenses and disbursements, it has not disclosed to the Union or the Board the information that would permit the calculation of the amounts owing. The Board directed the Employer to provide the information in paragraphs 5(c) and 5(e) of its December 19, 2005 decision. Despite being advised by the Union that it would be taking steps to enforce our directions through contempt proceedings, the Employer still did not bring the relevant information to the April 21, 2006 hearing. In the absence of that information, the Board cannot make a final order, and the Union cannot seek its enforcement. For these reasons, we have determined that we should exercise our discretion to state a case for contempt.

27. We have determined not to require the Employer to pay the local Union president's expenses of attending the April 21, 2006 hearing. As part of its remedial orders in section 96 applications, the Board has sometimes compensated unions for expenses "thrown away" or that would not have been incurred but for an employer's commission of an unfair labour practice.

These orders are not commonly made, but where they are, they have typically recognized that the union has incurred organizing costs in a certification campaign that was unsuccessful because the employer committed serious unfair labour practices. See *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Baron Metal Industries Inc.*, [2001] OLRB Rep. May/June 553; *K.L. Drywall & Acoustics Inc.*, [1999] OLRB Rep. March/April 208; and National *Excavating and Grading Ltd.*, [2003] OLRB Rep. Nov./Dec. 1073. In none of those cases did the Board award to the union any costs or expenses associated with its attending before the Board to secure a remedy for the unfair labour practice. Those kinds of expenses, regardless of whether they are disbursements or counsel fees, are "legal costs". There are a number of cases dealing with requests from the Board for legal costs. These were canvassed recently in *National Grocers Co. Ltd.*, [2003] OLRB Rep. May/June 467. While there is some variation in the jurisprudence, a fair summary of the proposition that emerges from it is that even if the Board has jurisdiction to award legal costs, it has always found that there are compelling reasons not to do so in the context of litigation involving parties to an ongoing relationship. We see no reason to depart from this approach in this case.

28. We turn now to the application for consent to prosecute. We agree with the articulation in *Fleck Manufacturing Company*, of the Board's role in dealing with such application:

> 2. On an application for consent to prosecute the function of the Board is to determine whether the evidence discloses a *prima facie* case against the respondents, raising arguable points of law appropriate for consideration by the Provincial Court. In performing this function the Board must be convinced not only that there is some evidence to support the prosecution but also that a prosecution would serve the interests of the bargaining relationship between the parties or generally advance the interests of collective bargaining in the Province.
> 3. The Board will, therefore, first review the evidence to find whether a *prima facie* case has been made out against each respondent and will turn lastly to consider, if such a case is established, whether it would serve the interests of industrial relations to grant consent to prosecute. It should be emphasized that in reviewing the evidence the Board does not make any final findings of fact nor does it make any ultimate determination as against any of the respondents. That is the exclusive function of the Court.

29. We agree with the Union that the facts it has alleged, and which we deemed the Employer to have accepted, constitute a *prima facie* case of a contravention of our directions. That *prima facie* contravention, viewed in the context of the Employer's historical record of behaviour which it has acknowledged in the initial hearing into Board File No. 1684-05-U, persuade us that this is an appropriate case in which to grant our consent to institute a prosecution in respect of the alleged contravention of our December 19, 2005 directions. We found in our December 19, 2005 decision (and the Employer agreed with our characterization) that the Employer has "utterly failed to recognize that the Union is the bargaining agent of its employees, and has failed to recognize the legitimacy of the collective bargaining and arbitration process". The allegations in the current application (if made out) suggest the Employer also does not recognize the legitimacy of the Board's jurisdiction to supervise collective bargaining

relationships or its authority to make binding orders on it. In our view, there is a useful labour relations purpose to be served in deterring parties from acting as if they are simply free to "opt out" of the collective bargaining regime and the Act and its provisions. It is also not apparent to us that any less drastic remedy than consent to prosecute will persuade this Employer that it must deal with this Union. In short, we find that this particular bargaining relationship, and labour relations in the province generally are likely to be advanced by our granting of consent to prosecute.

30. We are mindful of the fact that the Board rarely grants consent to prosecute and only slightly more frequently states a case for contempt, and that it may appear onerous for us to have done both. Each proceeding has a different purpose, and each is heard by a different level of Court. The contempt proceeding is a vehicle to compel the Employer to comply with our directions and provide us with the facts that will permit us to finally determine the outstanding remedial issues in Board File No. 1684-05-U. The granting of Consent to Prosecute recognizes that there is both a public and private interest in penalizing the alleged conduct of the Employer, and in deterring it (and other employers who might be inclined to behave the same way) from engaging in such conduct in the future.

Disposition of Files

31. The application in Board File No. 3719-05-U is granted.

32. We remain seized with respect to any further issues arising out of the implementation of our remedial orders in Board File No. 1684-05-U. This file is referred to the Board's solicitors for the purpose of stating a case to the Divisional Court as contemplated in paragraph 6 of this decision.

DECISION OF BOARD MEMBER R. R. Montague; May 9, 2006

I concur with all the findings of the decision with exception of paragraph 20 where I would have awarded the disbursements incurred by the local Union President in travelling from Ottawa Valley to Toronto to attend the hearing in the amount of $1,350.00. I do not do so lightly but I have never had a case in my 20 years on this Board where the employer had absolutely no regard for "the Board" and the complete and utter disregard for process and the rulings made against this employer by the Board.

3243-04-U Andrew Birnie, Dana Severn, David Young, Applicants v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 222, Responding Party v. ACSYS Automotive Component Systems of Canada A Division of BBK, Michigan, Intervenor.

Duty of Fair Representation – Discharge – The applicants challenged their union's settlement of discharge grievances without their consent – After an exhaustive investigation including video surveillance and computer intervention, the employer discharged the applicants for time theft and misuse of company property (the applicants were alleged to have contributed to an alternative workplace website which contained disparaging and false comments regarding the employer and its employees) – The applicants maintained their innocence and objected to any settlement overtures – The Board held that a s. 74 application is not a substitute for arbitration; the process is not a forum for assessing the correctness of the union's decisions, and the trade union is well within its rights to settle a grievance absent the grievor's consent – Finally, the Board found no violation of s. 87 of the Act when the union discontinued an internal appeal once the applicants had launched the instant complaint – Application dismissed

BEFORE: *Peter F. Chauvin*, Vice-Chair.

APPEARANCES: *Andrew Birnie, David Young* and *Dana Severn* appearing on their own behalf; *Barry Wadsworth, John Scanlan, Wayne Murphy* and *Rick Adkins* for the responding party; *Patrick Gannon, Joseph E. Ruffolo, Sandy Sainsbery, Donna Piggott, Chris Thompson* and *Antonio DiDomenico* for the intervenor.

DECISION OF THE BOARD: May 24, 2006

1. This is an Application under Section 74 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. On October 6, 2003 the Applicants were terminated from their employment at Automotive Component Systems of Canada Inc. ("ACS"). The National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) ("the CAW") and its Local 222 ("Local 222") filed grievances regarding their terminations. However, Local 222 ultimately settled these grievances on behalf of the Applicants, without their prior consent. The Applicants submit that in doing so Local 222 acted in a manner that was arbitrary, discriminatory or in bad faith in its representation of them.

3. Local 222 submits that it acted reasonably in settling the grievances on behalf of the Applicants. Local 222 submits that the terms of settlement that the Applicants wanted were unrealistic and that Local 222 believed that the Applicants would lose if they proceeded to arbitration. Accordingly, Local 222 submits that its settlement of the grievances, even without the Applicants' consent, was a much better and more prudent option than proceeding to arbitration. Accordingly, Local 222 submits that it represented the Applicants properly and did not violate section 74 of the Act. ACS supports Local 222's position.

4. In 2000, Peregrine sold the Oshawa Fabrication Plant to ACS. ACS, Local 222 and GM renewed Document 12. Accordingly, employees transferred upon that sale from Peregrine to ACS who had worked for GM and retained a seniority date of January 1, 1997 or earlier and who were actively employed by ACS at the time of their layoff at ACS also had certain recall rights to GM, in accordance with their seniority.

5. In June 2003 ACS announced that it would be permanently closing its Oshawa Fabrication Plant and commenced to lay off some of its employees.

6. On August 18, 2003 GM, ACS and Local 222 entered into a Memorandum of Agreement which provided employees of ACS who had not worked for GM, and were therefore not covered by Document 12, the opportunity to be offered a job as a new hire at GM, provided that they continue to work at ACS as an active employ until they are laid off and provided that they have, in the opinion of GM, a good work record.

7. ACS continued to employ some of its employees until June 2004, when it completely ceased its operations at its Oshawa Fabrication Plant.

The Applicants – Document 12 Rights for Mr. Young

8. David Young was hired by GM on or about September 2, 1983, and then became an employee of Peregrine and ACS as a result of the subsequent sales. Accordingly, Document 12 applied to Mr. Young. As such, he had, upon his layoff from ACS, the right to be recalled at GM, subject to his seniority, provided that he was an active employee of ACS at the time of his layoff. Mr. Young was employed as an Electrician at ACS.

9. Andrew Birnie and Dana Severn were hired by Peregrine in the spring of 1999. Accordingly, neither Mr. Birnie nor Mr. Severn were ever employed at GM, so Document 12 did not apply to them. As such, neither of them had, pursuant to Document 12, any recall or seniority rights with respect to GM. However, they did have the limited right to be considered for hire at GM as a new hire, pursuant to the August 18, 2003 Memorandum of Agreement. Mr. Birnie and Mr. Severn were employed by ACS as Industrial Mechanics. They both worked out of ACS's Maintenance Crib.

The ACS Animal Farm Union Website

10. In April 2003 ACS became aware of a website entitled "the ACS Animal Farm Union Website" ("the AFU Website"). ACS reviewed the AFU Website and concluded that it contained disparaging and false comments regarding ACS and its employees and statements and pictures suggesting acts of violence.

11. ACS retained its information systems provider to assist it in determining who was operating the AFU Website. Each computer has its own identifier code. A record of the computers that have been operating and accessing a website can be obtained. ACS obtained these computer records ("the computer records") from its information systems provider. These computer records were voluminous. They disclosed that many of the entries to the AFU website were being made during working hours from a computer in ACS's Maintenance Crib. Upon investigating this computer, ACS came to believe that it was an obsolete computer that had been removed from storage in the basement and installed in the Maintenance Crib without authorization.

12. To determine exactly who was making these entries from this computer, in May 2003 ACS commenced video surveillance of the Maintenance Crib. ACS then cross-referenced its video surveillance tapes with further computer records and concluded that the three Applicants

and five other employees were making entries to the ACS Website during working hours. ACS came to this conclusion because its video surveillance showed that the three Applicants and the others were sitting at and were making entries to the computer in the Maintenance Crib at the same time that the computer records showed that the AFU Website was being accessed through that computer. The computer records also showed that the three Applicants had spent much more time at the computer accessing and making entries to the AFU Website than had the other five employees.

13. More specifically, ACS concluded that during three weeks of video surveillance Mr. Bernie accessed the AFU Website approximately 120 times and spent in excess of 32 hours on the AFU Website during working hours. Similarly, ACS concluded that Mr. Severn had accessed the AFU Website approximately 21 times and had spent in excess of six hours on the AFU Website during working hours and Mr. Young had accessed the AFU Website approximately seven times and had spent approximately two hours on the AFU Website during working hours.

14. Also, from reviewing the entries to the AFU Website, ACS determined that a person who went by the nickname of "Scathands" was the Administrator of the AFU Website and that a person who went by the nickname of "Julian" was the Assistant Administrator of the AFU Website. ACS learned that the Administrator of a Website has some editorial control over the content of the entries to the Website. Both Scathands and Julian had made numerous entries to the AFU Website. From reviewing the materials, ACS concluded that Mr. Birnie was Scathands and that Mr. Young was Julian.

The Terminations

15. On October 6 and 7, 2003 ACS held interviews with the Applicants and five other employees regarding their involvement with the computer in the Maintenance Crib and the AFU Website. A Local 222 Committeeperson represented the Applicants at this interview. ACS showed the Applicants clips from its video surveillance which showed the Applicants making entries at the Maintenance Crib computer. ACS also told the Applicants and Local 222 that it had the computer records which established, in ACS's opinion, that the Applicants were involved in the administration of the AFU Website and had made many entries to the AFU Website during working hours. Notwithstanding this, the Applicants denied to ACS that they had any knowledge of the AFU Website and denied to ACS that they had posted anything to the AFU Website from the Maintenance Crib computer. Mr. Birnie did admit that he had been at the computer in the Maintenance Crib, to listen to the radio, conduct internet searches and bid on E-Bay, but denied that he was making postings to the AFU Website at those times. ACS was informed by one or more of the other five employees who were also terminated that the Applicants were very involved in the AFU Website.

16. At the end of the interviews, ACS terminated the Applicants and the five other employees. With regard to the Applicants, ACS cited 15 violations of ACS's rules and policies, including time theft, stretching lunch and break periods, conducting personal work during working hours, misuse of ACS property, making false or malicious statements concerning other employees, management, ACS or its products and breach of the duty of fidelity and loyalty to ACS.

17. During the evening of October 6, 2003, the surveillance camera from the Maintenance Crib was stolen. Mr. Bernie testified at the Consultation that someone else removed the surveillance camera and gave it to him. The surveillance camera was very small. Mr. Birnie testified at the Consultation that he kept the surveillance camera for a while and then gave it to Mr. Adkins. When asked who had taken down and given him the surveillance camera, Mr. Bernie testified that he could not remember. When asked why he kept the ACS's surveillance camera and then gave it to Mr. Adkins, rather than to ACS, he said that he did so because he felt that the surveillance camera had information in it which would be damaging to the Applicants and which should not be admissible. Mr. Birnie maintained this position throughout the Consultation.

18. Local 222 filed grievances on behalf of all eight of the employees.

19. The AFU Website was an MSN website. MSN has the authority to exercise control over what is posted on their websites. A complaint was made to MSN and MSN directed the AFU website administrator to have some of the more offensive postings removed from the AFU Website. These postings were removed, by "Julian". It was determined that the postings were removed from Mr. Young's computer, rather than the computer in the Maintenance Crib. The Applicant's maintained, right up to and throughout the Consultation, that Mr. Birnie removed these postings, without Mr. Young's knowledge, using Mr. Young's computer, Mr. Young's access code, and Mr. Young's nickname, "Julian", rather than his own, "Scathands". The Applicants insisted that Mr. Young did not remove these postings.

Local 222's Attempts to Resolve the Terminations

20. On October 9 and 15, 2003 Third Step meetings were held regarding these grievances. ACS again told of the Applicants that it had, in its opinion, overwhelming evidence establishing the Applicants' extensive use of the computer and their involvement in the creation and the ongoing administration of the AFU Website. ACS gave Local 222 the postings to the AFU Website, the computer records and the video surveillance. Notwithstanding this, the Applicants denied having created or administered the AFU Website or having made entries to it from the computer in the Maintenance Crib during working hours. In view of these denials, ACS became resolute in its determination that it would not reinstate the Applicants to employment.

21. In contrast, the other five employees admitted to having used the computer in the Maintenance Crib and admitted to the extent to which they had accessed or made entries to the AFU Website. The other five employees apologized, expressed remorse and pleaded for leniency. As a result of this, at least in part, Local 222 was able to negotiate the reinstatement of these employees, subject to suspensions without compensation.

22. Mr. Murphy testified that he had reviewed the AFU Website postings, the computer records and the video surveillance. The AFU Website postings and the computer records consisted of hundreds of pages detailing all of the postings to the AFU Website and all of the computers that had accessed the AFU Website. The video surveillance contained many hours of footage. Mr. Murphy testified that he concluded the AFU Website postings, the Computer records and the video surveillance would most likely convince an Arbitrator that the Applicants had spent a great amount of working time at the computer, that the entries to the AFU Website were offensive and that at least some of them had been made by the Applicants. Mr. Murphy also

concluded that an Arbitrator would most likely accept ACS's conclusion that Mr. Birnie was Scathands and the Website Administrator, and that Mr. Young was Julian and the Website Assistant Administrator.

23. The Applicants disagreed with Local 222's conclusions and tried to convince Local 222 that they had not done anything wrong of any significance. The Applicants maintained that they had not moved the computer to the Maintenance Crib, that the computer records did not prove that they had made the entries to the AFU Website, that ACS had condoned their use of the computer in the Maintenance Crib and that the video surveillance was unlawful and would not be admissible at an arbitration.

24. In view of this, the Applicants insisted that ACS could not prove that it had just cause to terminate them. Accordingly, the Applicants demanded they be reinstated, with full compensation. Furthermore, the Applicants demanded that they be given the opportunity to be recalled to GM, notwithstanding that Mr. Birnie and Mr. Young were not covered by Document 12.

25. Local 222 considered the Applicants' positions. Local 222 concluded that the Applicants' arguments would most likely not be accepted by an Arbitrator. Local 222 believed that ACS would consider the time theft charges, the information contained in the postings and the Applicants' denial of any involvement with the AFU Website to be very serious.

26. With regard to the video surveillance evidence, Local 222 made inquiries with its legal counsel, and others, and concluded that the video surveillance evidence would most likely be accepted as being admissible at an arbitration because it was initiated only after ACS had reasonable grounds to believe that the computer in the Maintenance Crib was being misused and because the surveillance was restricted to only the area of the computer. Also, Local 222 had just recently had another arbitration at which video surveillance evidence was held to be admissible. Local 222 lost that arbitration. That weighed heavily on Local 222's mind.

27. Local 222 told the Applicants that in view of the evidence and their persistent denials, that their terms of settlement were not realistic. Local 222 told the Applicants that they should admit to whatever involvement they had with the AFU Website so as to assist Local 222 in negotiating the best possible settlement for them. The Applicants refused to do so. Rather, they continued to maintain that they were relatively innocent and that ACS could not prove that it had just cause to terminate them.

28. Local 222 held several meetings with ACS to attempt to resolve the grievances. The time limit for proceeding to Step 4 was extended so as to give the parties more time to attempt to resolve the grievances. In view of the Applicant's proposed terms of settlement, Local 222 was not able to resolve the grievances. Accordingly, on October 27, 2003 Local 222 gave ACS notice of its intention to appeal the grievances to Step 4.

29. The Step 4 meeting was held on January 14, 2004. The Applicants had not changed their positions. Prior to the Step 4 meeting, Mr. Young provided Local 222 with a number of questions that he wanted Local 222 to ask ACS. Mr. Young believed that these questions would show that ACS could not prove its allegations against the Applicants. Local 222 gave these

questions to ACS, and ACS subsequently answered them. In view of ACS's assessment of the evidence and the Applicants' denials, ACS again denied the grievances.

30. On January 30, 2004, with the assistance of Pat Blackwood, CAW Skilled Trades Chairperson at GM, a grievance was filed against GM on behalf of Mr. Young. Mr. Scanlan was not aware that this grievance was being filed. Upon becoming aware of it, Mr. Scanlan discussed this grievance with Mr. Kennedy and concluded that the grievance was improper because Mr. Young had no status to file any grievance against GM. Mr. Young was not employed by GM. Rather, he was employed by ACS. Accordingly, Mr. Scanlan was of the view that the grievance would be dismissed, would only serve to irritate GM, and would therefore impede his efforts to negotiate recall rights for Mr. Young or for Mr. Birnie and Mr. Severn. Accordingly, Mr. Scanlan withdrew this grievance.

31. At some point, Mr. Birnie wrote a letter to the Mayor of Oshawa in which he strongly criticized GM for failing, in his opinion, properly decommission a property owned by GM. Mr. Birnie asserted that the City of Oshawa should force GM to clean up this property. This letter was forwarded to GM. GM raised this letter with Local 222. This letter clearly irritated GM and made it very difficult for Local 222 to negotiate any recall rights for Mr. Birnie at GM.

32. Notwithstanding this, Local 222 continued to discuss the grievances with ACS and GM, to no avail. Mr. Scanlon had a number of conversations with Mr. Young and Mr. Birnie. To try to put some pressure on ACS to settle, Local 222 decided to refer the grievances to arbitration. On February 4, 2004 Local 222 gave ACS notice of its intent to proceed to arbitration on all three grievances.

33. On February 9, 2004 Mr. Adkins and Mr. Scanlon met with the Applicants to discuss the option of proceeding to arbitration. The Applicants were given the opportunity to review the AFU Website postings, the computer records and the video surveillance. The Applicants took only a cursory look at these materials. Rather, the Applicants wanted to discuss whether this evidence was admissible and whether ACS could prove its case against the Applicants.

34. Mr. Young was originally granted Employment Insurance ("EI") benefits. ACS filed an appeal of that ruling. Mr. Young asked Mr. Adkins to attend at the EI Hearing, and he did, as an observer. ACS did not attend at the EI Hearing. The Hearing only lasted about 15 minutes. Mr. Adkins testified that, in his opinion, Mr. Young did not accurately or fairly state the facts to the Board of Referees. In a Decision dated February 17, 2004 the Board of Referees dismissed ACS's appeal. Mr. Young believed that this strongly supported the Applicants' position that ACS did not have just cause for their termination. Local 222 noted that ACS did not participate in the Board of Referees Hearing and that the issue determined by the Board of Referees under the Employment Insurance Act is different from the issue that would be before an Arbitrator. Accordingly, Local 222 concluded that the Board of Referees Decision did not cause it to change its position that the Applicants would most likely not succeed if they were to proceed to arbitration.

35. The Applicants continued to maintain their positions that they were relatively innocent and their demands regarding the terms under which they would be prepared to settle. ACS remained resolute that it would not reinstate the Applicants. Local 222 continued to believe that it was highly unlikely that ACS would reinstate Mr. Birnie and Mr. Severn and that it was totally

unrealistic that Mr. Birnie and Mr. Severn would have any recall rights to GM. Local 222 concluded that in view of Mr. Young's more than 20 years of seniority, it should focus its efforts on attempting to get Mr. Young reinstated so that he would be at least eligible for recall to GM pursuant to Document 12. Local 222 also concluded that it should attempt to negotiate the best possible settlement for Mr. Birnie and Mr. Severn, but that such settlements would most likely not include reinstatement.

36. By February 2004, the Applicants had become quite dissatisfied with Local 222, and its assessment of the grievances. The Applicants had numerous conversations, telephone calls, e-mails and meetings with Local 222 regarding same. The Applicants also contacted Buzz Hargrove, CAW President, and others, to express their dissatisfaction.

37. Faced with this, Local 222 continued to attempt to resolve the grievances. In total, Local 222 estimated that they had approximately 25 to 30 meetings with ACS and about 6 meetings with GM to try to resolve the grievances, to no avail.

Local 222's Settlement

38. On March 8, 2004 Local 222 and ACS agreed upon terms of settlement regarding the Applicants' three grievances. Local 222 did not inform the Applicants of the terms of settlement prior to agreeing to the settlements. Local 222 did not expect the Applicants to be pleased with the terms of settlement. However, Local 222 believed that the terms of settlement that the Applicants wanted were unrealistic and unattainable. Local 222 believed, in view of the facts that had been presented to Local 222 by ACS, and the conduct of the Applicants, that the terms of settlement were the best terms that Local 222 would be able to negotiate with ACS and were a far better option than proceeding to arbitration. Local 222 believed that if it took these grievances to arbitration, the discharges would be upheld, and the Applicants would achieve nothing from the arbitration procedure.

39. The terms of settlement were as follows. Mr. Young's discharge was rescinded. He was reinstated to ACS and was placed on active status so that he would be eligible to be recalled at GM pursuant to Document 12. Mr. Young was in fact subsequently recalled to GM. In addition to this, Mr. Young received $13,277 as SUB payments in excess of the EI payments he had received.

40. The discharges of Mr. Birnie and Mr. Severn were not rescinded. Mr. Birnie and Mr. Severn were not entitled to severance pay. However, notwithstanding this, Local 222 was able to negotiate a monetary package of $5,644.00 for Mr. Birnie and $5,581.00 for Mr. Severn. Mr. Birnie and Mr. Severn were not entitled to be recalled at GM because they were not covered by Document 12.

41. Local 222 considered these three settlements to be not only fair and reasonable, but also the best possible settlement that it could realistically hope to negotiate, in view of the seniority of each of the Applicants, their involvement with the AFU Website and their conduct. Mr. Murphy specifically said, "if we went to arbitration and lost, when we had a chance to settle, that would have been totally negligent". Mr. Murphy also said that "the easiest thing to do would have been to allow the Applicants to go to arbitration".

42. The settlements were reduced to writing and were signed by Local 222 and ACS on March 25, 2004. Local 222 explained the settlements to the Applicants. The Applicants were not pleased with the settlements, but they each accepted the payments they were entitled to under their Memorandum of Settlement. Mr. Young also accepted his reinstatement to ACS and his recall rights to GM.

The Appeal Under the CAW Constitution

43. Notwithstanding this, by letter dated April 7, 2004 the Applicants appealed their grievance settlements under the CAW's Constitution. By letter dated April 19, 2004 Alex Keeney, CAW National Representative, informed the Applicants that their appeal was improper and must be denied because it did not comply with Article 24 of the CAW Constitution which states that "the appeal should be specific and detailed in describing the action or decision and include all supportive information".

44. The Applicants provided further information and refiled their appeal. By letter dated May 17, 2004, Mr. Keeney informed the Applicants that he had received the additional information and that he would commence the process of gathering further information to conduct his investigation of the matter. Mr. Keeney had to collect from Local 222 the AFU Website postings, the computer records, the video surveillance and any other relevant documents and information so that the CAW National Office could conduct an independent investigation into the Applicants' appeal.

45. By letter dated October 4, 2004, the Applicants complained that the CAW was taking too long to conduct the investigation and stated that they intended to file a section 74 complaint. By letter dated October 5, 2004 Mr. Keeney responded, stating that he had received the required documents and other information and that he would be in touch with the Applicants once he had reviewed it in its entirety.

46. By letter dated November 2, 2004 the Applicants again expressed dissatisfaction with the pace with which they felt that the CAW was processing their appeal and again stated that they would be filing a section 74 complaint. By letter dated November 12, 2004 Mr. Keeney again wrote to the Applicants, stating that:

> I would like to clarify a few statements that you attributed to me. When I returned your telephone call on November 1, 2004, I informed you at that time that I intended to schedule a hearing on the matter. You asked what a hearing would entail and when it would take place
>
> My response to you was that the reason for me holding a hearing was that it was a huge file and I could not make a decision based on the files presented and rather than guess at what they meant, I would be holding a hearing to get all questions answered.

> You stated that the hearing would have [sic] take place within the next two weeks or you would be forced to file a section 74 with the Ontario Labour Relations Board.
>
> I informed you that due to my schedule it would not happen in that time frame and as the National Executive Board has to respond to all appeal decisions, I could not have the answer you were looking for in two weeks. I informed you that if you went outside of the Union, that the appeal process would stop.
>
> At no time did I tell you that I did not have time to deal with your issues. It is unfortunate that you consider this as blackmail into continuing the process as I clearly told you that it was your decision as to what direction you take on behalf of yourself and the co-Applicants.

47. On December 20, 2004, the Applicants filed this section 74 Application. As a result of this, and as indicated in its November 2, 2004 letter, the CAW discontinued its internal appeal.

The Consultation

48. At the Consultation, the Applicants were evasive and deceptive. At first, they would agree to almost nothing. Rather, they took the position that it was up to Local 222 and ACS to prove the facts that were relevant to this matter, even though many of those facts appeared to be self-evident and should not have been in dispute.

49. Also, the Applicants' memories were selective. For example, Mr. Birnie admitted that he had possession of the stolen ACS surveillance camera, but would not explain how he got it. Ultimately, after substantial questioning, he stated that someone gave it to him. When asked who it was, he stated that he thought that it was one of three people, but could not remember which of these three people it was, and did not want to guess.

50. Towards the end of the Hearing, the Applicants began to admit to things that they had earlier denied. For example, at the beginning of the hearing Mr. Birnie would not agree that he was "Scathands" and Mr. Young would not agree that he was "Julian". However, towards the end of the Hearing, Mr. Birnie admitted, for the first time, that he was "Scathands" and Mr. Young admitted, for the first time, that he was "Julian".

51. One of the Applicants' main arguments in their defence was that ACS should have prevented all of this from happening because ACS should have had a computer program, such as a program called Websense, which the applicants submitted would have identified that persons within ACS's internal computer network were accessing improper internet sites rather than using the computers only for proper business purposes. However, the Applicants stated, in their Application that the computer in the Maintenance Crib was not connected to ACS's internal computer network. Also, it was not established whether ACS had such a computer program, or whether such a program would have been able to, in fact, detect and identify the Applicants' computer activities as being prohibited, even if the computer was connected to the ACS internal network. Access to the internet is not completely prohibited.

Submissions of the Parties

52. The Applicants submit that Local 222 failed to conduct a proper investigation of the facts and the law regarding their discharge. The Applicants submit that Local 222 should have concluded that the surveillance evidence would be inadmissible at an arbitration and that the other evidence could either not be proven or would not amount to just cause for their discharge. Accordingly, the Applicants submit that Local 222 acted in a manner that was arbitrary, discriminatory and in bad-faith when it decided to settle their grievances without their consent. Also, the Applicants submit that Local 222 violated section 87(2) of the Act when it discontinued its internal appeal under the CAW Constitution because the Applicants had said that they were going to file a section 74 complaint against Local 222.

53. Local 222 submits that it assessed the strength of the evidence against the Applicants, considered the state of the law, sought the assistance of the Applicants in explaining the claims of ACS, stayed in contact with the Applicants and ultimately settled the Applicants' grievances on the most favourable terms that Local 222 could achieve. Local 222 submits that the settlements are much more beneficial to the Applicants than taking the risk of proceeding to arbitration. Local 222 submits that it acted in the best interests of the Applicants when it settled their grievances, even though it did not seek the Applicants' prior consent to the terms of settlement. Local 222 submits that it did not, in any way, violate section 74 of the Act.

54. ACS submits that Local 222 was diligent and thorough in representing the Applicants. ACS submits that Local 222 did not in any way violate section 74 and requests that this Application be dismissed.

The Legal Issues

55. It is useful to first review the issues and the law that applies to the facts in this matter. The facts give rise to three legal issues. The first issue is whether a section 74 Application is a substitute forum for arbitration. The second issue is whether Local 222 violated section 74 in connection with the decisions it made throughout its handling of the Applicants' grievances. The third issue is whether Local 222 specifically violated section 74 by ultimately settling the Applicants' grievances without their prior consent.

Is a Section 74 Application a Forum for Arbitration?

56. An important starting point is to define what the issue is in this section 74 Application. The issue is whether Local 222 acted in a manner that was arbitrary, discriminatory or in bad faith in its representation of the Applicants. A rough simplification of this is whether Local 222 acted reasonably when it made the decision to settle the Applicants' grievances without their consent.

57. The issue is not whether the Applicants would have been successful if Local 222 had proceeded to arbitration regarding the Applicants' terminations. The role of the Board in a section 74 Application is not to substitute itself for the Arbitrator and determine, as if it were the Arbitrator, whether the Applicants would have succeeded at the arbitration. Rather, the role of the Board is to determine whether the Local 222 acted in a manner that was arbitrary, discriminatory or in bad faith when it made decisions regarding the Applicants' grievances. To

determine this, the Board may have to look in to the underling facts pertaining to the grievance to assess whether the union's decisions appear to have been reasonable. However, in doing so, the Board is not conducting a Hearing into the merits of the grievance. A section 74 Consultation is not a forum to hold grievance arbitration.

Disagreement with the Union's Decisions

58. Also, the issue is not whether every decision that Local 222 made was completely correct or the best possible decision, as now reviewed by the Applicants and the Board, with the benefit of hindsight. Nor is the issue whether the Applicants or the Board simply disagree with one or more of the decisions of the Local 222. Such a standard would be stifling for a union and would encourage employees to challenge every decision that their union made, if the outcome was not to the complete satisfaction of the employee. Accordingly, a union is held to a lower standard than correctness. The Board will find a contravention of section 74 only where the union's conduct is much more severe than amounting to a decision which the applicant feels is inappropriate or wrong. In *ITE Industries*, [1980] OLRB Rep. July 1001, the Board expressed the test to be applied as follows:

> It is clear that in order to establish a breach of section 68 [now 74], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

59. Also, the union's conduct is measured by an objective standard of review, not a subjective one, as a set out in the following passage from *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35:

> The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it – rather it should ask whether it is a decision that could

> reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

60 Also, it is quite clearly established that a union is not required to process every grievance to arbitration. Rather, as is stated in paragraph 20 from *Catherine Syme*, [1983] OLRB Rep. May 775, a union is entitled to take in to consideration several factors in assessing whether it should process the grievance, as long as the union acts in good faith in doing so:

> 20. Section 68 [now 74] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining union who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official – especially an elected one – cannot be expected to exhibit the skills, ability, training and judgment of a lawyer.

61 See also *Lear Corporation Canada Ltd.*, [2004] O.L.R.D. No. 1492 and *George Lee*, [1994] OLRB Rep. Aug. 1009.

Settlement Without Prior Consent

62. If a Union can withdraw a grievance against the employee's wishes, it makes sense that a union can settle a grievance without the employee's consent. The settlement of a grievance is much more favourable to an employee than the withdrawal of a grievance. As long as the Union does not act in a manner that is arbitrary, discriminatory or in bad faith in its settlement of the grievance, the Union does not violate section 74. In order to succeed, the Applicant must be able to prove that the Union's decision was arbitrary, discriminatory or in bad faith. This is established in the following Board case law.

63. *Collins and Aikman Plastics Ltd.*, [2000] O.L.R.D. No. 1374, provides a concise summary of the Board's position relating to the settlement of grievances without employee consent:

> It is well established that a union has a right to settle (or withdraw) a grievance, even without the consent of an

> individual grievor. In doing so, it must, of course, turn its mind to the merits of the grievance and consider, among other things, the potential consequences of the settlement or withdrawal upon the individual, the likelihood of success at arbitration and the interests of the bargaining unit as a whole.

64. If the Union in can demonstrate that it diligently weighed the employee's expectations against what was reasonably or realistically achievable through arbitration – that is, that the union conducted a "costs-benefit analysis" – and concluded that it was a more rational decision to enter into a settlement, even without the grievor's consent, then the union will not have violated section 74. The union has the carriage of a grievance, and can unilaterally settle or withdraw same, provided that it has rational reasons for doing so. See, for example: *University of Waterloo*, [2006] O.L.R.D. No. 811; *Toronto (City)*, [2004] O.L.R.D. No. 4063; *General Motors of Canada Ltd.*, [2003] O.L.R.D. No. 981; *Leggett & Platt*, [2003] O.L.R.D. No. 2786; *Toronto Bagel – Canada Bread*, [2002] O.L.R.D. No. 75; *Movenpick Restaurant*, [2002] O.L.R.D. No. 1190; *Coca-Cola Bottling Co.*, [2001] O.L.R.D. No. 2671, and; *Bombardier Aerospace*, [2001] O.L.R.D. No. 4472.

Analysis and Findings

65. I find that Local 222 did not violate section 74 for the following reasons.

66. Local 222 fully represented the Applicants at their termination interviews on October 6 and 7, 2003 and that their Step Three Meetings on October 9 and 15, 2003. Local 222 filed grievances immediately after the Applicants were terminated. There is no indication, nor was it alleged, that Local 222 entered into this matter with any ill will or animosity towards the Applicants.

67. Local 222 attempted to resolve the Applicants' terminations. However, their efforts were made substantially more difficult, if not impossible, by the positions that the Applicants took. The Applicants admitted to only what was obvious. For example, the Applicants admitted that they were sitting at the computer, but not that they were making entries to the AFU website. Also, neither Mr. Birnie nor Mr. Young admitted that they were Scathands or Julian. In the eyes of ACS, the Applicants failed to understand or accept that they had done anything wrong and failed to take any responsibility for their actions. In view of this, ACS became resolute that it would not accept the Applicants back as employees.

68. Local 222's conclusion that the video surveillance evidence could be admissible at arbitration was reasonable. Local 222 consulted with their legal counsel, and others, considered the relevant factors in determining whether video surveillance evidence is generally admissible and considered its own experiences with video surveillance evidence. Local 222's conclusion that the video surveillance evidence could be admissible at arbitration was not arbitrary, discriminatory or in bad faith and does not amount to a violation of section 74.

69. Similarly, Local 222's assessment of the other evidence against the Applicants and the Applicants' overall chances of succeeding at arbitration was reasonable. Local 222 did not act in a manner that was arbitrary, discriminatory or in bad faith in concluding that the charges against

the Applicants were very serious and that, in view of the positions that the Applicants were taking and the Applicants' conduct, that the Applicants were not likely to succeed at arbitration.

70. Local 222's assessment of the EI Board of Referees decision was also reasonable. It was not arbitrary, discriminatory or in bad faith for Local 222 to conclude that the EI Board of Referees decision was not significant enough of a factor to cause Local 222 to proceed to arbitration.

71. The Board is satisfied that Local 222 fully satisfied its duty to represent the Applicants. Local 222 had numerous meetings with the Applicants, ACS and GM. The fact that these meetings did not result in a settlement that was satisfactory to the Applicants and that Local 222 did not refer these grievances to arbitration does not mean that Local 222 acted in a manner that was arbitrary, discriminatory or in bad faith. Rather, the fact that Local 222 ultimately decided that it had to unilaterally settle these grievances rather than refer them to arbitration was a result of the Applicants' conduct, rather than any failure of Local 222. The Applicants refused to admit to anything unless it was obvious, minimized their involvement with the AFU website, failed to accept that they had done anything wrong of any significance, failed to take responsibility for their actions and put forward terms of settlement that were not, in view of all of the above, realistic. This left Local 222 with a significant challenge. In settling the Applicants' grievances in the way that it did, the Board is satisfied that Local 222 did the best that it could, given what little it had to work with.

72. All of these conclusions are made in the context of the case law referred to above. To summarize, the first issue is not whether the Applicants would have won if they had gone to arbitration. Rather, the issue is whether Local 222's assessment of the Applicants' odds of success was reasonable. I find that it was. Secondly, the issue is not whether the Applicants disagree with Local 222's decisions. Rather, the issue is whether those decisions were reasonable. I find that they were. Thirdly, the issue is not whether the Applicants consented to the settlement. Rather, the issue is whether the unilateral settlement without the Applicants' consent was reasonable. I find that it was, notwithstanding that Mr. Young was reinstated and Mr. Birnie and Mr. Severn were not. The settlements reflect the unique circumstances of each of the Applicants' cases.

73. The last remaining issue is whether the CAW violated section 87(2) of the Act when it discontinued the Applicants' appeal under the CAW Constitution because the Applicants stated that they were going to file this section 74 Application. The relevant portions of Section 87(2) states that:

> No trade union … shall intimidate or coerce or impose a pecuniary or other penalty on a person because … the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act."

74. The Applicants raised this issue in their Application but did not substantially pursue this issue at the Consultation. Nevertheless, that Board does not find that CAW violated section 87(2). Local 222 and CAW had worked extensively with the Applicants. The Applicants were not satisfied with either Local 222 or the CAW. The Applicants made it clear that they

intended to file a section 74 Application. The CAW's November 12, 2004 letter indicates that the relationship between the Applicants and the CAW was strained and that the Applicants were taking difficult positions. The November 12, 2004 letter indicates that the CAW was still trying to work with the Applicants and process their appeal. However, the CAW ultimately informed the Applicants that if they filed a section 74 Application, the CAW appeal would stop. At that point, the Applicants' issues would be addressed through the section 74 Application.

75. I do not find that the CAW was attempting to intimidate, coerce or impose a penalty upon the Applicants when it informed the Applicants that the CAW appeal would stop. Rather, I find this to have been a logical position to take, and a logical consequence of the Applicant's decision. It would not have been productive to have the Applicants' concerns addressed simultaneously in two forms. If the Applicants wished to file a section 74 Application, it made sense to deal with the Applicants' concerns in that forum. It was the Applicants' decision to file a section 74 Application. The CAW did not interfere with that decision, or attempt to intimidate or coerce the Applicants. The logical consequence of the Applicant's decision was that the CAW appeal would be discontinued, and the Applicants' concerns would be addressed in a section 74 Application.

76. The Application is dismissed.

0830-06-M Labourers' International Union of North America, Local 527, Applicant v. **Cornwall Gravel Co. Ltd.**, Responding Party.

Discharge – Interim Relief – Unfair Labour Practice – The union sought interim reinstatement of its key inside organizer, McDonell, who was discharged during an organizing drive – The employer claimed it knew nothing of the organizing drive and that McDonell was fired for the rude and belligerent way he complained about the "swing shift system" – The Board found an appearance of a causal relationship between McDonell's termination and his exercise of rights under the Act because of the following elements: he was a 6 year employee with no discipline record; he had complained before about the "swing shift system" without discipline; other employees complained, even rudely, and were not disciplined; the organizing drive had lasted a few weeks involving some 30 employees and hence it was likely the employer was aware of it; the ostensible reason for the termination was closely related to the lawful activities of discussing working terms and conditions – The other criteria set out in s. 98.1 were met and the Board ordered interim reinstatement, among other orders – Relief granted

BEFORE: *Mary Ellen Cummings*, Alternate Chair.

APPEARANCES: *Benjamin A. Barnes, Luigi Carrozzi, Shaun McLaughlin* and *Duncan McDonell* for the applicant; *Michael S. Ruddy, David Grant, Peter Grant, Jennifer Grant, Michelle D'Amours, Emile Burton* and *Fraser Outerkirk* for the responding party

DECISION OF THE BOARD; June 30, 2006

1. This is an application seeking interim substantive relief, brought pursuant to section 98.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended, ("the Act"). The applicant Labourers' International Union of North America, Local 527 ("the union") seeks the interim reinstatement of Duncan McDonell, who it asserts, is its key inside organizer in a campaign to organize the truck drivers employed by Cornwall Gravel Co. Ltd. ("the employer"). The employer resists the application, asserting that the union has not made out the test that it will suffer irreparable harm if Mr. McDonell is not reinstated, nor should the Board be satisfied that Mr. McDonell was terminated because he was exercising his rights under the Act.

2. At the start of the process, I outlined how the Board would proceed by way of consultation, with the goal of collecting information I needed to make a determination about the criteria set out in section 98.1. I directed questions to Peter Grant and David Grant to better understand the basis of the decision to terminate Mr. McDonell. I then permitted counsel to ask questions of those deponents, again with the focus on providing the Board with the information it needed to make a determination about the criteria in section 98.1. I indicated that this process was not intended to make any decisions about whether or not an unfair labour practice had been committed, but only to determine those issues set out in section 98.1. After hearing from those declarants, I gave the parties an opportunity to propose that I needed other information from other sources. Neither party thought that further information was required. Both parties made submissions based on the declarations and pleadings they had filed and the oral testimony of Peter Grant and David Grant.

Information provided by the parties

3. The employer is a family business, which has operated since 1949. Peter Grant and David Grant, along with their father Lionel Grant, make the significant business decisions and have a considerable involvement in the day-to-day activities of the business. Cornwall Gravel Co. Ltd. supplies asphalt and granular material, specializing in road construction and asphalt paving. Truck drivers who deliver both asphalt and granular material are important to the road building and asphalt operations.

4. The employer has been subject to audits by the Ministry of Transportation ("MOT") in respect of the number of hours its drivers work. I heard from David Grant that these audits have identified instances in which drivers are putting in too many hours, jeopardizing both the operator's licence and the licences held by the company. Loss of licences would not only take trucks off the road, disrupting road construction and asphalt paving, but infractions can result in MOT withdrawing any contracts it has made with the employer to build or pave roads. At this point, the employer is engaged in its largest road construction project ever on Highway 401, and its client is MOT. David Grant said that it is critical that the employer's drivers comply with MOT's rules about hours at all times to preserve its licensing, and in fact, a good portion of the work it has contracted to perform.

5. The challenge for the employer is that paving and road building crews work longer hours than the drivers who deliver material to those jobs are permitted to be on the road. As a solution, approximately 3 years ago, the employer implemented a "swing shift" program, in which part-time drivers are hired to work the "extra" hours to service the paving and road building jobs. Both David and Peter Grant testified that this solution is not popular among the

full-time drivers who perceive that the part-time drivers are "taking away" their hours. There have also been grumblings that the part-time drivers are damaging the trucks. Friction recurs as the dispatchers have to constantly re-adjust the schedule to account for the rolling averaging of hours MOT's rules on drivers' hours require. David Grant said that although the drivers are supposed to track their own hours, the dispatchers are constantly reminding them about MOT's rules that demand last-minute schedule changes, which result in a full-time driver "losing" a day on the schedule. There is daily interaction between the drivers and the dispatchers and a fair bit of it concerns changes for the schedule, the reasons for it, with many opportunities for friction, particularly as the paving and road construction season starts up. Peter Grant testified that at the start, the employer hires more part-time drivers than it is likely to need because it can take a while before the right balance is found, and the employer cannot afford to be caught short in the transition time.

6. Towards the middle of May, David Grant began to get complaints from the dispatchers, Michelle D'Amours and Jennifer Grant, his daughter, that the drivers were very agitated about the swing shift schedule. In particular, David Grant heard that Duncan McDonell was rude and belligerent and appeared to be encouraging other drivers to challenge the shifts they were being assigned and the need for the swing shift system. I heard about two instances towards the end of May where Mr. McDonell inserted himself into issues that other drivers were having, upsetting normally calm and courteous drivers, and seeming to escalate the concerns, so that it was hard for the dispatchers to solve them. David Grant found his daughter crying at the end of her shifts, and Michelle D'Amours was also upset.

7. In addition to the information that David Grant got from the dispatchers, similar observations were passed on by the general manager and foreman. Mr. Grant also overheard at least one conversation in the yard where Mr. McDonell was complaining about the swing shift to another employee and encouraging him to complain about it too.

8. On June 1, 2006, David Grant got a call from his daughter Jennifer, saying she could see Mr. McDonell in the parking lot "agitating drivers". David Grant called and asked his father to join him, and they walked out to the parking lot. When the Grants appeared, the three employees each got into their cars. David Grant asked Mr. McDonell to stay and a brief conversation followed. According to David Grant, they asked Mr. McDonell if he was happy in his employment, and Mr. McDonell admitted he was not. They had a discussion about the swing shift system, and Mr. McDonell's opposition to it, particularly for the Highway 401 project, where he thought it was unnecessary. There was, according to Mr. Grant, no discussion about Mr. McDonell's behaviour with the dispatchers or other employees.

9. According to David Grant, after the meeting he and his father met with the dispatchers, the foremen and the general manager and decided to terminate Mr. McDonell. David Grant said that he was concerned with how the dispatchers were being treated, particularly his daughter, and Mr. McDonell's behaviour was not likely to change, meaning that agitating fellow employees would continue. David Grant felt that Mr. McDonell was trying to prevent them from doing what they had to do, that is, implement the swing shift schedule. But he reserved a final decision until he and his father could meet with his brother, Peter, which happened the next day.

10. Peter Grant had been more generally aware of drivers' complaints about the swing shift schedule, but Mr. McDonell's name seemed to pop up often and he felt that the tension was

increasing. After discussing the matter with his brother and father, Peter Grant agreed with the decision to terminate Mr. McDonell because his presence was not good for the morale of others. When Mr. McDonell was fired on June 2, 2006, both Peter and David Grant recalled Mr. McDonell commenting to the effect, "I thought this was resolved yesterday." Mr. McDonell was paid severance pay. He had approximately 6 years of service.

11. The employer does not contest the union's assertion that it was conducting an organizing campaign among its drivers, which took place in the months of May and June 2006, and resulted in applications for certification being filed with the Board on June 6 and June 8, 2006. The employer states that it was unaware of the organizing campaign or Mr. McDonell's role in it.

12. The Board's review of the certification files confirms, through an examination of the membership evidence, that the campaign was taking place in May and early June and that Mr. McDonell witnessed membership cards upon which the applicant relies in its certification applications. The certification files also indicate that the bargaining units in question number approximately thirty drivers, with the final numbers not yet agreed to.

The Law

13. Section 98.1 (2) and (3) requires the Board to assess and balance a number of criteria.

> **98.1** (1) On application in a pending proceeding, the Board may,
>
> (a) make interim orders concerning procedural matters on such terms as it considers appropriate;
>
> (b) subject to subsections (2) and (3), make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate; and
>
> (c) subject to subsections (2) and (3), make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated but whose terms and conditions of employment have been altered or who has been subject to reprisal, penalty or discipline by the employer.
>
> (2) The Board may exercise its power under clause (1) (b) or (c) only if the Board determines that all of the following conditions are met:
>
> 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
>
> 2. There is a serious issue to be decided in the pending proceeding.

> 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
>
> The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.
>
> (3) The Board shall not exercise its powers under clause (1) (b) or (c) if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.
>
> (4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.
>
> (5) With respect to the Board, the power to make interim orders under this section applies instead of the power under subsection 16.1 (1) of the *Statutory Powers Procedure Act*.
>
> (6) This section applies only in respect of an alteration of terms and conditions of employment or a dismissal, reprisal, penalty or discipline that occurred on or after the day section 7 of the *Labour Relations Statute Law Amendment Act, 2005* comes into force.
>
> (7) This section, as it read immediately before the day section 7 of the *Labour Relations Statute Law Amendment Act, 2005* came into force, continues to apply in respect of events that occurred before that date.

Analysis

14. For the reasons set out in paragraph 13, I am satisfied that the union was carrying on an organizing campaign at the time Mr. McDonell was terminated. I am also satisfied that Mr. McDonell was a key inside organizer for the union, and not just a supporter, based on his role in respect of witnessing the signing of membership cards. It appears that he was a link, if not the only link, between the "outside" union organizers and the employees. Whenever the Board receives a complaint about the termination of a key organizer, during an organizing campaign, the matter is a serious one. The termination of an organizer not only tends to bring the campaign to a halt but sends a chill through the workforce as employees sensibly link the termination to the employee's role in the campaign. In the Board's experience, it is hard to overstate the impact of the termination of an organizer on the union's campaign. Such an event has a profound impact on employees' perceptions about their freedom to organize. Employees readily conclude that having anything to do with the union will result in their termination. In this case then, there is no doubt there is a serious issue to be determined.

15. The employer challenged the suggestion that Mr. McDonell's reinstatement is necessary to prevent irreparable harm to the union. Counsel noted that the applicant has filed two applications for certification. In the construction industry application, the applicant asserts that it has membership evidence on behalf of more than 55% of the employees in the bargaining unit. Further, a representation vote has taken place in the industrial application on the basis of the Board being satisfied that there was an appearance that the applicant had more than 40% of the employees as its members. In such circumstances, counsel asserted, there is no irreparable harm. The membership campaign cannot be stalled.

16. I accept the argument of the union that the organizing campaign is far from over. There are a number of status issues already identified in the industrial application. The union needs the information and co-operation of employees to resolve those status issues, which is not likely to occur while Mr. McDonell is out of the workplace and the union seen as ineffective in bringing about his reinstatement. It is also possible, as counsel for the union argued, that there will be a representation vote in the construction application, and Mr. McDonell's reinstatement is necessary for there to be any prospect that the vote represents the true wishes of the employees.

17. But I must also balance the harm to the employer of Mr. McDonell's reinstatement. The employer has characterized Mr. McDonell as belligerent and abusive to dispatch staff and eager to foment dissent. On the other hand, there is no suggestion that in the three seasons Mr. McDonell has been required to operate under the swing shift system, he has refused to work as scheduled, nor have other employees refused to work as scheduled, despite their griping. On balance, I conclude that the union will endure more harm than will the employer, and so that factor favours Mr. McDonell's reinstatement.

18. But the statute provides in section 98.1(3) that I may not reinstate Mr. McDonell "if it appears to the Board that…the dismissal… was unrelated to the exercise of rights under the Act by an employee." As the Board found in *Patrolman Security Services Inc.*, [2005] OLRB Rep. Sept./Oct. 818 (October 6, 2005, Board File 1928-05-M), at paragraphs 59 and 60, the Legislature does not intend the Board to engage in an exhaustive inquiry, as we would when we get to deciding the unfair labour practice complaint that serves as the foundation for this request for interim substantive relief. We must apply our labour relations sensibilities to the information before us and seek a practical result, understanding that a cursory review may result in errors that can be cured when the unfair labour practice complaint is fully adjudicated.

19. Counsel for the responding party conceded that the timing of events might cause the Board to conclude that the termination of Mr. McDonell was related to the exercise of his rights under the Act. However, counsel urged me to conclude that there was no reliable information before the Board that would cause me to conclude that the employer had any knowledge of an organizing campaign, nor of Mr. McDonell's role in it. More important, counsel submitted that the declarations it relied on, coupled with the testimony of Peter Grant and David Grant, painted a compelling picture of legitimate reasons to terminate Mr. McDonell. He was a disruptive influence who was persistently seeking to undermine management and its implementation of the necessary swing shift system.

20. I am only required to satisfy myself that there is an appearance that the termination of Mr. McDonell was related to his participation in and support for the organizing campaign. The

following elements of this case lead me to conclude that there is an appearance of a causal relationship between Mr. McDonell's termination and the exercise of his rights under the Act.

- Mr. McDonell was a 6-year employee, with no record of discipline.
- Mr. McDonell had complained about the swing shift system in each of the two previous seasons, without discipline.
- Other employees complained about the swing shift system, some rudely, and were not disciplined.
- The organizing drive spanned a few weeks involving bargaining units numbering around 30, suggesting that it is unlikely someone in management, or close to management, did not know something about it, if only because of the number of employees who would have been approached to permit the union to file the applications.
- Mr. McDonell was terminated in the midst of the organizing campaign.
- The conduct engaged in by Mr. McDonell that was the reason identified by the employer for firing him is not so different from what an inside organizer would do while engaging in protected activities. Mr. McDonell was terminated because he challenged management about terms and conditions of employment that affected his compensation and those of his fellow employees. He encouraged other employees to complain and seek changes. I am not suggesting that the Act sanctions abusive behaviour. But when the ostensible reason for a termination so closely resembles the lawful activities of discussing conditions of employment with colleagues, highlighting job security issues and proposing how collective action through membership in the union might bring about change, it more readily appears that there is a causal connection between the termination and the employee's participation in protected activities under the Act.

Conclusion

21. I conclude that the applicant has satisfied the onus in section 98.1 for interim substantive relief. The balance of harm favours his reinstatement, and there appeared to be a causal connection between the termination and Mr. McDonell's activities in organizing for the union.

Disposition

22. The Board orders Cornwall Gravel Co. Ltd to:

a) reinstate Duncan McDonell immediately to employment on the same terms and conditions he enjoyed prior to June 2, 2006;
b) refrain from suspending, discontinuing or otherwise terminating Duncan McDonell's employment or changing the terms and conditions of his employment

until the Board issues final decisions in the unfair labour practice complaint (Board File No. 0817-06-U), except with the consent of the union or of the Board, on application by the responding party;

c) post a copy of this decision in the dispatch office at Cornwall Gravel Co. Ltd. in a location where its employees are likely to see it;

d) keep the copy of this decision posted for not less than 30 days; and

e) post a copy of the attached Notice to Employees in the dispatch office at Cornwall Gravel Co. Ltd. in a location where its employees are likely to see it and keep it posted for 30 days.

23. I remain seized to deal with any issues arising out of the implementation of this decision.

Appendix "A"
The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

We have posted this notice in compliance with a direction of the Board, issued after a hearing in which both the company and the union had the opportunity to make submissions.

The Board has ordered Cornwall Gravel Co. Ltd. to reinstate Duncan McDonell ON AN INTERIM BASIS until the Board considers the reason for his discharge. A hearing before the Board will commence soon. The purpose of that hearing is to determine why Duncan McDonell was discharged.

If the Board ultimately determines that Duncan McDonell was discharged for reasons that had nothing to do with his support for the Union, the temporary reinstatement order will be revoked, and the Company will no longer be required to employ him.

If the Board ultimately finds that his discharge occurred because he was a union supporter, exercising his rights under the *Labour Relations Act*, the Board may confirm his reinstatement, and direct that he be compensated for all earnings and benefits lost as a result of his discharge.

Employees in Ontario have these rights which are protected by law:

> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
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> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
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> An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.
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> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.
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> An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.
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> An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.

It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filled with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 30th day of June, 2006.

1773-05-R Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America, Applicant v. **Eastway Construction Ltd.**, Responding Party.

Bargaining Unit – Certification – Construction Industry – Sector Determination – Status – In this application for certification for a bargaining unit in all sectors in the construction industry other than the ICI, the status of five individuals was in dispute – Sector was a disputed issue and the Board considered for the first time whether the "majority of time" test from *Gilvesy* should apply to a consideration of sector – The Board noted that it took a "snapshot" of what occurred on the date of application to determine which bargaining unit an employee was employed in – The Board has used the majority of time test to determine which trade of work an individual was performing and also to determine into which geographic area an individual worked (see *Advance Tile and Carpet*) – The Board found there was no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and the sector – Accordingly it was appropriate to apply a majority of time test, where the unit applied for does not encompass all sectors, to assess whether the person falls within the applicable sector – The Board upheld the union challenges to four of the five individuals – Certificate issued

BEFORE: *Caroline Rowan*, Vice-Chair.

APPEARANCES: *Steven Bosnick, Carmelo Castiglione* and *Tony Candiano* appeared for the applicant; *Raymond Wan, Zhi Wei Liu, Jun Fa Gan, Zi Yan Deng*, and *Zhen Ming Zhou* appeared for the responding party.

DECISION OF THE BOARD; June 13, 2006

1. This is an application for certification filed under section 128.1 of the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act"). The application was filed with the Board on August 31, 2005.

2. By decision dated September 9, 2005, the Board found the following bargaining unit to be appropriate for collective bargaining:

> all carpenters and carpenters' apprentices and construction labourers in the employ of the responding party in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

3. Prior to the hearing in this matter, the parties had agreed that 2 of the 14 individuals listed by the responding party on Schedule A filed with its response were employees in this bargaining unit and that 7 others were not. The status of the following five (5) individuals (also identified by their list number) remained in dispute:

#3 Zi Yan Deng ("Deng")
#4 Zhen Ming Zhou ("Zhou")
#12 Zhi Wei Liu ("Liu")
#13 Jie Kun Li ("Li")
#14 Jun Fa Gan ("Gan")

4. The Board could not determine the percentage of employees in the bargaining unit who are members of the applicant pursuant to subsection 128.1(4) without resolving these outstanding status disputes. The Board therefore convened a hearing to hear evidence concerning those disputes.

5. At the hearing, the responding party was represented by Mr. Raymond Wan, a director of the responding party and not by legal counsel. The Board frequently conducts hearings at which one or more of the parties are not represented. While there is no obligation for parties who appear at the Board to retain legal counsel, a hearing before the Board is a legal proceeding and persons appearing on their own behalf bear the risks involved with doing so.

6. The responding party asserts that, on August 31, 2005, the date of application, all five disputed individuals were employees in the bargaining unit on the basis that they were performing labourers' work at a residential job site at 8 Shady Oak Crescent ("8 Shady Oak"), which is in Board Area 8. The applicant disputes that any of these five individuals were present at that job site on the date of application. A determination of this issue will therefore turn on the Board's assessment of the credibility of the witnesses and/or the reliability of their evidence.

7. The applicant also argues, in the alternative, that the Board should not find that the disputed individuals were employees in the bargaining unit for the purposes of this certification application because some of them worked at a project that falls outside of the scope of the bargaining unit. More specifically, the union asserts that they worked at one of the responding party's job sites in the industrial commercial and institutional ("ICI") sector of the construction industry – which is outside of the applied for bargaining unit - for a majority of their workday on August 31, 2005. The union therefore contends that those individuals, who did not work at a job site that falls within the applicable sector(s) for the majority of their workday on the date of application, should not be treated as employees in the bargaining unit for the purposes of the certification application. The union relies on what has become known as the *Gilvesy* test in support of this alternate argument.

Decision

Applicable Legal Principles

8. The history and rationale for the *Gilvesy* test, which focuses on whether an employee was doing bargaining unit work for a majority of his/her time on the date of application, is set out in *Gilvesy Enterprises*, [1987] OLRB Rep. February 220, as follows:

> 16. In applications for certification in the construction industry, a person must be at work on the date of application in order to be included in the bargaining unit for the purposes of "the count" (see for example, *Smiths Construction Company Arnprior Limited* [1984] OLRB Rep. March 521). In addition, an individual must be doing bargaining unit work in order to be included in it. In the past, the Board has determined whether an employee is in the bargaining unit by looking at the work that employee did during the majority of the time on the date of application (see for example *O.J. Gaffney Limited.*, [1964] OLRB Rep. Dec. 419; *Nedan Forming Company Limited.*, [1965] OLRB Rep. May 100; *Clairson Construction Company Limited*, [1968] OLRB Rep. Apr. 126; *Deer-Mine Services Limited*, [1971] OLRB Rep. June 336; *George Asmussen Limited*, [1971] OLRB Rep. Oct. 683). Even when an employee was doing the work of one classification or craft on the date of application but has previously been engaged in doing the work of several trades or crafts but at the same wage rate, the Board has been willing to examine a representative period of time prior to the date of application to ascertain what work an individual spends the majority of his time doing and whether or not he/she is properly included in the bargaining unit. …
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> …
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> 23. … However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and is represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" has tended to result in protracted and

> expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of "representative period" and restrict itself to the following criteria:
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> (a) whether the person was employed by the respondent and at work on the date of application; and
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> (b) if so, the work that that person spent the majority of his/her time doing on the date of application; or
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> (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

In *Gilvesy Enterprises, supra*, the Board eliminated the use of a representative period in favour of assessing the work each individual did for the majority of his/her time on the date of application, unless the evidence in that regard was not conclusive.

9. Since that time, the Board has regularly used the above criteria to determine whether an employee of a responding party is an employee in a particular construction bargaining unit where there is a dispute concerning the trade or craft of work performed by a disputed individual on the date of application. However, I am not aware of any previous cases in which the Board has expressly utilized a "majority of time test" in order to assess whether an individual spent the majority of his/her workday within the relevant sector(s). The issue that arises in this case is therefore whether in assessing "the work that that person spent the majority of his/her time doing on the date of application", the Board should consider not only what trade of work was performed but also in which sector(s) the work was performed.

10. In *Advance Tile and Carpet*, [2000] O.L.R.D. No. 2555, the Board found it appropriate to apply a majority of time test to assess whether the individual in question spent the majority of his/her workday within the geographic scope of the bargaining unit and not simply to distinguish the work performed as between different trades. The Board reasoned as follows at paragraph 21:

> 21. While an employee can be employed in different bargaining units at different times, he/she can only be in one bargaining unit at any one point in time. The determining factor is in which bargaining unit did the employee spend a majority of his/her time on the date of application. *The majority of time test applies equally to identifying the geographic area in which the employee was working as to identifying the nature of the work being performed.* In each case, the Board is "taking a snap shot" and

> determining which single bargaining unit the employee falls within on the date of application. The definition of the bargaining unit is as much a function of the type of work being performed as that of its geographic scope.
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> [emphasis added]

In that case, the Board found that a disputed individual who had spent the majority of his work day doing work of the relevant trade at a job site located outside of the geographic scope of the bargaining unit was not an employee in the bargaining unit in issue. The Board concluded that that individual was properly excluded from the bargaining unit for the purposes of the certification proceeding, even though that individual may have spent a minority of his workday on the date of application performing work of the relevant trade in the Board Area for which the union had applied. The Board in that case therefore found it appropriate to apply the majority of time test to a different aspect of the scope of the bargaining unit than simply the nature of the work performed.

11. In my view, there is no material or principled distinction between identifying the geographic scope in which the employee was working on the date of application and identifying the sector(s), in which the work was performed. For the same reasons articulated in *Advance Tile and Carpet, supra* and for the reasons elaborated upon below, I am persuaded that it is appropriate to consider the sector(s) in which the disputed individuals worked for the responding party for the majority of their time on the date of application where the unit applied for does not encompass all sectors of the construction industry.

12. Because of the short-term duration of the employment relationship in the construction industry, the Board's focus in construction certification applications is on those persons actually at work for the responding party on the date of application and the work that they performed on that date. In addition, even though an individual can be employed in different bargaining units at different times depending on the work performed, it is well-established Board policy that an individual can only be in one construction bargaining unit on the date of application for the purposes of a representation proceeding. In *Construction Gasperino Di Iorio Inc.*, [1997] O.L.R.D. No. 2855, the Board reviewed the jurisprudence on this issue as follows:

> 58. The core principle of law applicable to the facts before us was succinctly summarized by the Board in Harnden & King Construction Ltd., [1987] OLRB Rep. Dec. 1510, at para. 14:
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> Where more than one application for certification is made on the same day in respect of the same employer and involves more than one bargaining unit comprised of employees of the same employer, or one application for certification is made in respect of more than one bargaining unit, an employee can only be in one bargaining unit at the time the application is made. See *Laurent Lamoureux Co. Ltd.*, [1985] OLRB Rep. Nov. 1618 at 1623. Thus, while employees may, depending on their work, be employed in different bargaining units at different times, an employee can only be in one bargaining unit at any specific point in time. … Thus, the determination of the number of employees

> in the bargaining unit is made as of the day the application was made. Therefore, while an employee may be performing work that is normally done by employees in different bargaining units on the day an application is made, and may also have worked in different bargaining units both before and after the application date, the Board, for purposes of an application for certification will only consider an employee to be in one bargaining unit when the Board makes its determinations under sections 7(1) and 7(2) of the Act.
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> The Board made the same point in *Wraymar Construction & Rental Sales Ltd.*, [1989] OLRB Rep. July 682, at paragraph 15:
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> While it is possible for an employee to be employed in different bargaining units at different times, s/he can only be in one bargaining unit at any one point in time. As the *Gilvesy* test and that line of cases demonstrates, the Board has concluded that, for construction industry certification purposes, the date of application (which is "the time the application was made" for the purpose of section 7(1) constitutes a single point in time. Consequently, an employee can only be in one bargaining unit for certification purposes. ...
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> See also *Associated Paving Company Ltd.* (Board Files 2282-92-R and 2283-92-R, unreported decision dated June 19, 1995), and *Mike Weber's Construction Company Limited* (Board Files 2962-90-R, 2973-90R, 3161-90-U, 3431-90-U, unreported decision dated February 3, 1993).

In construction certification applications, the Board therefore takes a "snapshot" of what occurred on the date of application in order to determine in which bargaining unit the employee is employed for the purposes of a certification application filed that day. The Board has applied the majority of time test to assess different aspects of this snapshot. As noted above, the Board has used this test to determine which trade of work the individual was performing on the date of application and, in *Advance Tile and Carpet, supra*, also to determine into which geographic area an individual worked. In my view, it is also appropriate to apply a majority of time test to assess whether the person falls within the applicable sectors.

13. If the Board were to accept that *any* amount of time spent performing work of the applicable trade within the scope of the sector(s) applied for on the application day is sufficient to bring an employee within the scope of that unit for the purposes of a certification application, a number of problematic and/or inconsistent findings could arise. Firstly, an individual could conceivably be treated as being employed in a number of different bargaining units of employees of a responding party for the purposes of representation proceedings filed on the same day - a result which is contrary to Board policy in representation proceedings. For example, an employee who spent the majority of his/her work day performing labourers' work for the responding party on an ICI job site in Ontario and some lesser portion of his/her work day doing labourers' work at a residential job site in Board Area 8 would be treated as an employee in an application made

pursuant to section 158 of the Act for a unit consisting of all construction labourers in the ICI sector in the Province of Ontario and all construction labourers in all other sectors in Board Area **9**. If another application for certification were also filed that same day in respect of the same responding party for a unit of all construction labourers in all sectors of the construction industry, excluding the ICI sector, in Board **8**, that same individual would also be included as an employee in that unit.

14. Because that result is contrary to well-established Board policy in representation proceedings, a different test would be required in the event that more than one certification application in respect of employees of the responding party were filed on the same day. However, as noted by the Board in *Gilvesy Enterprises, supra*, it is important that the Board's tests be consistent and create an equitable means of determining which persons are in a bargaining unit. Since the objective is to apply a consistent standard that takes a "snapshot" of the work performed by the employee in question on the date of application, it follows that, in the usual case, all aspects of the work performed by the employee for the majority of that day should fall within the scope of the bargaining unit, including work falling within the applicable sectors of the construction industry.

15. In addition, potential mischief could result if any amount of time in the relevant sector(s) were sufficient for an employee to be included in the unit for which the union applied. A trade union that filed a certification application on a particular day after having watched which employees of the responding party were performing work of the relevant trade for the majority of that day at the responding party's job sites falling within the scope of the bargaining unit sought could have its application defeated by the responding party's decision to reassign its workforce as soon as the application for certification was delivered to the responding party. For example, a responding party who had labourers working at an ICI site and labourers working at a residential job site on the date of application could simply send all of its labourers who were working at the ICI job site to pick up some garbage at its residential job site for a short period at the end of their work day in an effort to defeat a certification application received that day in respect of a unit of all construction labourers in all sectors of the construction industry, excluding the ICI sector.

16. Finally, if performance of *any* amount of time in the sector(s) for which the union applied were sufficient to have a person included, the union's organizer would be required to monitor and the Board would be required to consider, what trade of work that individual performed in sectors which fall outside of the scope of the relevant bargaining unit. The Board would be required to do so, since the jurisprudence makes clear that an individual must have performed work of the relevant trade for the majority of the day on the date of application. In my view, the Board should not be looking at one "snapshot" of the work done by an employee when it comes to the trade and a different "snapshot" of the work that that individual did on the date of application when it comes to sector and yet a different "snapshot" again if more than one application for certification in respect of the responding party's employees were filed on the same day. Quite apart from the hurdles that such a varied approach would place to organizing and adjudication, such an approach would also result in inconsistent outcomes depending on whether one or more than one certification application were filed on a given day.

17. I therefore conclude that it is appropriate, in the circumstances of this case, to consider also the sector(s) in which the employees were working for the majority of their workday for the

responding party given that the bargaining unit applied for does not encompass all sectors of the construction industry.

Assessment of the evidence concerning the disputed individuals

18. With these principles in mind, I now turn to an assessment of the evidence regarding the disputed individuals and whether they should be treated as employees in the bargaining unit for the purposes of this representation proceeding. In arriving at my findings of fact in this case, I have considered all of the evidence and have taken into account such factors as the demeanour of the witnesses, the clarity of their evidence, the witnesses' apparent ability to recall events and to resist the tug of self-interest in their responses to the questions, and what seems most reasonable and probable in all of the circumstances having regard to the evidence as a whole.

19. In the present case, the union does not claim to have been monitoring the 8 Shady Oak job site on the date of application. The union's representative, Mr. Castiglione, did however investigate the responding party's claim to have had a number of employees performing labourers' work at that job site on the date of application shortly after receiving the responding party's response to the application. Mr. Castiglione testified that, approximately one week later, on or about September 7, 2005, he attended at the 8 Shady Oak job site and spoke to employees of a framing subcontractor who were working on site. He questioned them concerning whether they had seen any employees of the responding party performing labourers' work on the job site the week before. According to Mr. Castiglione, the framers he spoke to informed him that they had not seen any employees of the responding party on site performing labourers' work and complained that they had to cut a branch in their way and that they did their own housekeeping.

20. Mr. Shaun Tetley, who operates a framing business called KJT Carpentry Inc., which was the framing subcontractor for the 8 Shady Oak site, was called to testify by the union. The union submits that Mr. Tetley's evidence confirms that no employees of the responding party were working at the 8 Shady Oak site on August 31, 2005 and that his evidence should be preferred to that of the four individuals in dispute who testified for the Company that they attended at the 8 Shady Oak job site in the afternoon of August 31, 2005.

21. Mr. Tetley testified that he did hands-on framing work and site supervision at the 8 Shady Oak job site during a two week period when his partner was on his honeymoon. At the time of his testimony, Mr. Tetley could not be precise as to when this two-week period began and ended. He indicated that it was sometime in the latter part of August or the beginning of September 2005. The union contends that the Board should conclude from the evidence that the two-week period Mr. Tetley referred to in his evidence includes the last week of August when the application for certification was filed. The responding party, on the other hand, suggests that Mr. Tetley was not on site until the first week of September based on information recorded in the responding party's site supervisor's journal, but which was not entered into evidence.

22. It is however, in my view, unnecessary to resolve this difference between the parties given Mr. Tetley's specific evidence that he could not recall at the time of his testimony whether he was actually on site on August 31, 2005. Mr. Tetley noted only that his normal summer hours were from 7:00 a.m. to 5:00 p.m. and that, during that two week period, he was generally on site doing framing every weekday, weather permitting. Mr. Tetley noted that the only reason the framers would leave the site is if it rains. The evidence before the Board is that it was raining in

the morning on August 31, 2005 and that it rained heavily at around 10:30 a.m. and then lightened up or stopped later in the day. In the circumstances, even if the two-week period. Mr. Tetley referred to began in the last week of August as the union claims, it is entirely possible that the framers were not working all day on August 31, 2005 because of the weather. Mr. Castiglione testified that when he visited the job site the next week, he asked the framers specifically whether they had not worked because of the rain on August 31, 2005 and that they responded that they had put up the scaffolding to do the roof trusses. Mr. Castiglione's evidence concerning information provided to him from unspecified persons is hearsay evidence and does not, in any event, indicate that the framers worked until 2:30 p.m. or later on August 31, 2005 when the disputed individuals claim to have arrived.

23. In addition, given that Mr. Tetley could not confirm that he was actually at the 8 Shady Oak job site on August 31, 2005 and in particular in the afternoon when the individuals in dispute are alleged to have been working on site, the Board finds his evidence to be of little or no value in determining whether to accept the responding party's contention that it employed labourers at the 8 Shady Oak site on the date of application. While the Board found Mr. Tetley to be a credible witness, his evidence cannot be preferred since it does not necessarily contradict the evidence of the responding party's witnesses.

24. I next turn to an assessment of the evidence of the individuals whose status is in dispute. As noted, I heard evidence from only four of the five individuals whose status was in dispute. Li was not called as a witness.

(i) Deng

25. Deng testified that on August 31, 2005 he first worked at a job site at 454 Yonge Street, which the parties agree is a job site in the industrial commercial and institutional sector ("ICI") sector of the construction industry. It is common ground that the work he performed at that job site that day is not therefore bargaining unit work. Deng however testified that he then drove to the 8 Shady Oak site in order to give another worker (whom he identified as "A. Ming") a ride and to provide some material to the site including some wiring for the fence and some long screws. He gave that material to an individual he identified as "Wei".

26. In asserting that Deng should be considered an employee in the bargaining unit, the responding party relies on the fact that it allocated a number of hours work for this individual to the 8 Shady Oak site in its own internal cost allocation. While there is no evidence before the Board concerning those cost allocations, such evidence would not in any event persuade the Board that Deng should be considered an employee in the bargaining unit. The test for determining whether an employee should be considered employed in the bargaining unit for the purposes of a certification application in the construction industry is well established. In the circumstances of this case, the evidence must, at a minimum, establish that Deng performed either labourers' work or carpenters' work on a non-ICI job site on August 31, 2005, the date of application. There is no evidence before the Board that Deng did so. The only evidence concerning his attendance at a non-ICI job site that day was that he dropped off one worker and some material to the 8 Shady Oak site and then left.

27. Having regard to the evidence before it, the Board finds that Deng is not an employee in the bargaining unit for the purposes of this certification application.

(ii) Liu

28. Liu testified that on August 31, 2005 he also first worked at the ICI job site located at 454 Yonge Street from 9:00 a.m. until approximately 2:00 p.m. (i.e. a five hour period). As previously indicated, work at this job site is not bargaining unit work. Liu indicated that he then went for lunch for approximately one hour and then drove to the 8 Shady Oak site. He testified that he arrived there at approximately 3:00 p.m. and worked there until between 8:00 p.m. and 9:00 p.m. Although Liu suggested in his evidence that he then left to go to another non-ICI job site thereafter, the union objected to that evidence given that the responding party had never identified that additional job site in its response. In response to the objection, the responding party agreed not to lead evidence concerning the work Liu did at that additional job site. The parties therefore proceeded on the basis that Liu worked at two job sites on the date of application, the first being an ICI job site and the second being a residential site.

29. According to the evidence of Liu, he worked at the ICI job site for a period of five hours in the morning and then worked for in excess of five hours in the afternoon at 8 Shady Oaks i.e. from 3:00 p.m. to between 8:00 p.m. and 9:00 p.m. that day. Liu testified that the work he did at 8 Shady Oak that day was repairing the fence as well as a gate, cutting down a small tree or shrubs, collecting garbage and removing the dirt and water from the basement. He claims to have done all of these tasks with two other workers, whom he identified as Li and Afa. Even though Liu was unable to be specific at the time of his testimony concerning the order he performed the tasks, the Board has insufficient reason to doubt his testimony that he performed those tasks on that day for a period of in excess of five hours. As noted, the Board does not accept that Mr. Tetley's evidence contradicts the testimony of Liu or others given that Mr. Tetley could not confirm that he was even present at the job site on August 31, 2005. For the same reason, the Board is also unable to conclude, as the union suggested, that Liu must have arrived after Mr. Tetley's usual quitting time, and therefore that he spent less than half of his day performing bargaining unit work at that site.

30. Having regard to the evidence before it, the Board finds that Liu spent the majority of his day performing work of the bargaining unit and therefore should be treated as an employee of the bargaining unit for the purposes of this certification application.

(iii) Gan

31. Gan testified that he worked at 8 Shady Oak on August 31, 2005. He did not however testify concerning what work he actually did at that job site that day or how long he performed any given task or what he did at any other site that day. There is further little or no evidence concerning what type of work Gan generally did for the responding party or any evidence concerning his primary reason for hire. Gan testified that he worked for the responding party for approximately one month and worked at 8 Shady Oak only once on August 31, 2005. He stated that he worked on some residential sites as well as on various ICI job sites such as 454 Yonge Street and a retail store, but did not indicate what kind of work he generally did.

32. Having regard to the evidence presented, the Board is unable to find that Gan is an employee in the bargaining unit for the purposes of this certification application.

(iv) Zhou

33. Zhou testified that he worked at the 8 Shady Oak job site backfilling and compacting the ground inside the garage on both August 31, 2005 and September 1, 2005. He states that the ground was uneven when he started that task but was smooth when he completed it. According to Zhou, he started working at the ICI job site at 454 Yonge Street on August 31, 2005 commencing at 9:00 a.m. He testified that he was dropped off at the 8 Shady Oak site later that day by an individual he called "Dixon" and worked backfilling and compacting the ground from between 2:30 p.m. and 3:00 p.m. until approximately 7:00 p.m. (i.e. for a period between 4 and 4 ½ hours) at the 8 Shady Oak site.

34. The Board does not however find Zhou's evidence that he worked on August 31, 2005 backfilling and compacting the ground in the garage to be credible in all the circumstances. In this regard, the Board notes that, while Zhou claimed that the ground in the garage was *very* smooth when he finished that task on September 1, 2005, the Board prefers Mr. Castiglione's testimony that the ground in the garage was uneven and did not appear to have been compacted when Mr. Castiglione visited the job site and looked at the ground in the garage approximately one week later on September 7, 2005. Mr. Castiglione also testified that he visited the job site again on October 19, 2005 and that the ground in the garage was still very uneven. The photographs taken of the garage on those two days show some unevenness but are not on their own conclusive. The Board however accepts Mr. Castiglione's testimony that the apparent unevenness of the ground in a location near the wall of the garage shown in a photograph taken on October 19, 2005 appears to have been caused by the ground having sunk down after having gotten wet. Mr. Castiglione's uncontradicted evidence was that the ground would not sink in this way when it gets wet if it has already been compacted. In all the circumstances, the Board does not find Zhou's account that he backfilled and compacted the ground in the garage on August 31 and September 1 until it was very smooth to be credible.

35. The Board is not therefore satisfied that the evidence before it establishes that Zhou is an employee in the bargaining unit for the purposes of this certification application.

(v) Li

36. As noted above, Li did not testify in this proceeding. Information No. 9 entitled "Status Disputes in Certification Applications in the Construction Industry" advises the parties that a party that asserts that an individual should be on the list or in the bargaining unit has the responsibility for ensuring that individual's attendance at the hearing and for calling that individual as a witness. As such, in the present case, the responding party had the obligation to call him as a witness. Mr. Wan, on behalf of the responding party, advised the Board that Li had gone back to China and as a consequence was not available to testify.

37. In *489584 Ontario Ltd. (c.o.b. F.G. Aluminum & Glass)*, [1997] O.L.R.D. No. 3394, the Board sustained the union's challenges to the list in the absence of any evidence from the disputed individuals to substantiate the employer's position that the challenged individuals are on the employer's list. Similarly, in *Chislett Asphalt Roofing Ltd.*, 2005 CanLII 35127 (O.L.R.B.), the Board found that the employer in that case had not substantiated its position that a challenged individual who was not called to testify was an employee in the bargaining unit, since the only evidence to substantiate it was hearsay evidence, which was contradicted by other hearsay evidence.

38. In the present case, the only evidence before the Board concerning what Li might have done on the date of application was given by Liu, who referred to having worked on that job site with an individual who went back to China and whose last name is "Li". However, even assuming that Liu identified the individual named "Li" sufficiently to satisfy the Board that he was, in fact, referring to the individual in dispute named Li, the Board is unable to conclude that the evidence before the Board is sufficient to substantiate the responding party's position that Li is an employee in the bargaining unit. In this regard, the Board notes that Liu could not speak to what other work Li did for the responding party on August 31, 2005. Liu did not further indicate the time Li arrived or left the site at 8 Shady Oak such that the Board could conclude that Li performed bargaining unit work for the majority of the day on the date of application. There is also insufficient evidence before the Board to substantiate the responding party's position that Li should otherwise be treated as an employee in the bargaining unit. There is, for example, no evidence before the Board concerning what work Li generally did for the responding party or concerning his primary reason for hire.

39. In all the circumstances, the Board is unable to find that the evidence establishes that Li is an employee in the bargaining unit for the purposes of this certification application.

Disposition

40. On the basis of the evidence presented, the Board upholds the union's challenges to the disputed individuals other than Liu. As noted above, the Board finds that the responding party has substantiated its position with respect to Liu in that the evidence establishes that he spent the majority of his time performing bargaining unit work on the date of application. The total number of individuals properly on the list for the purposes of this certification application is three, being Liu and the two individuals, Oscar Diego Sebastian Frigole and Sergio Arce, who were previously agreed to be properly on the list of employees.

41. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) the information provided under subsection 128.1(3) of the Act), the agreements reached by the parties and the Board's findings herein, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant on the date the application was filed.

42. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. There is nothing raised in the application or the response that would cause the Board to consider directing a representation vote.

43. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

44. The Board is satisfied that it should certify the applicant.

45. Therefore, pursuant to subsection 128.1(13) of the Act, a certificate will issue to the applicant trade union in respect of all carpenters and carpenters' apprentices and construction labourers in the employ of Eastway Construction Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and

Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

46. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

4243-05-G United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Applicant v. **E.S. Fox Ltd.**, Responding Parties.

Construction Industry Grievance – Human Rights Code – The applicant grieved the employer's refusal to accept a referral to work of an employee over the age of 65 – The employer argued that it had established a policy not to "hire or employ" individuals over the age of 65 in November 2004 – The applicant argued that the employer did not consistently apply its policy (the employer had not required any employee who turned 65 to leave the workplace), therefore its application of the policy to the grievor was arbitrary, discriminatory or unreasonable – The Board considered the recent amendments to the Ontario *Human Rights Code* (eliminating mandatory retirement), passed in December 2005 but only coming into effect in December 2006 – Even in the absence of the recent legislative amendments, the Board would have found the employer's actions discriminatory since the policy was not uniformly applied – Grievance allowed

BEFORE: *Corinne F. Murray*, Vice-Chair, and Board Members *G. Pickell* and *A. Haward*.

DECISION OF THE BOARD; May 1, 2006

1. This is a referral of a grievance to the Board for determination under section 133 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended ("the Act"). The applicant withdrew its application against Bruce Power LP prior to the hearing held on April 10, 2006.

2. This referral requires the Board to consider whether the rejection of the applicant's referral of Harold Keelan to E.S. Fox Ltd. ("Fox") because he is 65 years of age or older is a violation of the collective agreement binding upon these parties.

3. The parties based their arguments upon the following agreed facts:

> 1. The Applicant, U.A. and its U.A. Local 527 and E.S. Fox Ltd. are bound by the Ontario Provincial Power Sector Collective Agreement between the Electrical Power Systems Construction Association and the Union, effective until May 30, 2010 ("the U.A./EPSCA Collective Agreement").

2. E.S. Fox Ltd. has had a policy of having its salaried and non-union employees retire at age 65 since at least 1978 (attached).

3. On or about October 28, 2004, E.S. Fox Ltd. advised Doug Wilson of EPSCA that E.S. Fox Ltd. would initiate its own retirement policy to match that of Bruce Power with respect to unionized employees (attached).

4. On or about November 9, 2004, E.S. Fox Ltd. advised the Union of the initiation of the policy to its members at the Bruce Project (attached).

5. On or about November 26, 2004, the Union advised E.S. Fox Ltd. that the Union's position was that E.S. Fox Ltd. did not have a retirement policy applicable to the bargaining unit nor that any such policy has been consistently applied to members of the bargaining unit (attached).

6. Harold Keelan's ("the Grievor"), date of birth is January 1, 1940.

7. Harold Keelan the Grievor was retired by Bruce Power in accordance with its mandatory retirement policy at age 65 and became eligible for his pension in accordance with the Pension Plan provisions. Harold Keelan did not collect a pension but continued to work at his trade.

8. E.S. Fox Ltd. placed a call to the U.A. Local 527 Hiring Hall for the referral of a plumber to commence work.

9. U.A. Local 527 dispatched the grievor to fill the request for manpower and submitted a referral slip on behalf of the grievor to E.S. Fox Ltd. by facsimile transmission date of March 1, 2006 (attached).

10. On March 1, 2006 by facsimile transmission, E.S. Fox Support Building roject Manager Jeff. R. Thiel ("Thiel") responded that it would not accept the referral of the grievor because "he is presently at or over the age of 65" (attached).

11. U.A. Local 527 Business Manager Steve Morrison ("Morrison") and Assistant Business Manager John Germann separately spoke with Thiel and had further discussions with respect to this refusal to hire the grievor. Thiel confirmed this refusal by facsimile dated March 2, 2006. (attached).

> 12. The decision to refuse the referral of the Grievor for work at the Bruce Nuclear Power Development on the E.S. Fox Ltd. Support Building Project was taken entirely by E.S. Fox Ltd. and no one from Bruce Power LP participated in that decision. Bruce Power LP does not require any contractor to refuse to hire or continue to employ persons over the age of 65 at any of its Bruce Nuclear Power Development Projects.
>
> 13. E.S. Fox Ltd. has employed members of U.A. Local 527 over the age of 65 at the Bruce Nuclear Power Development pursuant to the U.A./EPSCA Collective Agreement as detailed in the attached lists.
>
> 14. At each time each member of U.A. Local 527 reported for work at the Bruce Nuclear Power Development for E.S. Fox Ltd., the member is required on the first day reporting to the job site to complete all income tax documentation including TD-1 forms disclosing the date of birth of the member such that E.S. Fox Ltd. has full knowledge of the age of all employee members of U.A. Local 527 working on its Bruce Nuclear Power Development projects.
>
> 15. There is no issue that the work to be performed by the grievor in response to the request for manpower was within the normal capabilities of a Certificate of Qualification construction plumber and pipe fitter. Harold Keelan is a Certificate of Qualification construction plumber and pipefitter. E.S. Fox Ltd. did not assess Harold Keelan's capabilities with respect to the work available.

The parties also agreed to bifurcate this application so that proof of damages would be occur after liability had been determined.

4. The applicant asserts that the juxtaposition of Articles 8.6(b) and (c) with Article 35.7 of the U.A./EPSCA Collective Agreement imposes upon Fox the obligation to justify any rejection from employment on the basis of "just and sufficient cause". Article 8.6(b) and (c) provide:

> 8.6 The employment of tradesmen and apprentices, excluding key tradesmen, shall be carried out on the following basis and sequence:
>
> ...
>
> (b) The Association office, or the Employer's office, with the approval of the Association, will request the appropriate Local Union office for tradesmen and apprentices required. The Union will furnish competent workmen on request. **The Employer shall have the right to determine competency and qualifications and to reject any new**

> **applicant and to discharge and discipline any employer for just and sufficient cause.**
>
> The employer shall not discriminate against any employee by reason of his membership in the Union or his participation in its lawful activities.
>
> The Employer shall have the right to request Union members from that local Union having jurisdiction for the geographic area by name, in writing, who shall be issued a referral slip by the local Union. The number of employees so requested shall not exceed fifty percent (50%) of the employees supplied to the job by the local Union, subject to the local Union being able to supply. This ratio shall not be exceeded at any point during the project.
>
> (c) Local Union members who are resident in the Province of Ontario will be referred by the Union for employment through the Association office, or the Employer's office, with the approval of the Association. As much as their out-of-work list will permit, the Union will supply members on a fanout basis from the project or work location.
>
> **The Employer will either hire such persons or substantiate their reasons in writing for not doing so.**
>
> . . .

Article 35.7 provides that a grievance alleging unjust and insufficient cause for employer action may proceed at step 1 of the grievance procedure.

5. The highlighted sentences above show the parties contemplated that the only permissible reason for rejection of a referral is "just and sufficient cause", Article 35.7 being specific as to the processing of this type of grievance. The applicant adds that the Letter of Understanding, attached to the U.A./EPSCA Collective Agreement that gives an employer the right to refuse to hire its "former employee" who has retired from that employer and who has signed a waiver that the hire will not be re-employment, is not relevant in these circumstances.

6. The applicant further asserts that the facts stated in paragraphs 2, 3, 4, 5 and 7 of the Agreed Facts and the documents in support thereof are irrelevant since none of these actions are contemplated by the collective agreement. Its provisions establish a higher hurdle (i.e., "just & sufficient cause") than that which was found in *Re Electrical Power Systems Construction Association and Ontario Hydro and Ontario Allied Construction Trades Council*, (1978) 18 L.A.C. (2nd) 205 (Carter et al. exercising jurisdiction under the predecessor of section 133 of the Act) to have been applicable to the implementation of retirement policies that were "unfettered" by general collective agreement language. In that case the employer action of extending its existing policy of compulsory retirement for regular employees at age 70 to casual employees was not found to be circumscribed by the provision of the collective agreement restricting the employer's right to "dismiss or suspend" to circumstances where there was "sufficient and reasonable cause". Having thus found that this management right was unfettered by the

collective agreement, the Board decided that there is nevertheless an implied qualification that this right not be exercised in an arbitrary, discriminatory or unreasonable manner. Of the three factors relevant to the determination of whether this standard was unsatisfied, the applicant highlighted the need for uniformity of application of the policy and asserted that Fox had failed on this account.

7. The applicant cited the decision in *H.E. Vannatter Ltd. and U.A.W., Local 251 (Palimaka) (Re)* (2002) 106 L.A.C. (4th) 242 made in the context of the current *Human Rights Code*, R.S.O. 1990, c.H.19, as amended (the "Code") with respect to a collective agreement that prohibited discrimination based upon age, without any limit, as a situation where an arbitration board underlined the need for the employer to give adequate notice of the exercise of its management right to institute a "retirement policy". The employer could still continue to act upon a mandatory retirement policy of long standing and uniform application, so long as adequate notice was given. The applicant emphasized that both of these decisions were determined prior to the current amendments to the Code being passed by the legislature in 2005.

8. According to the test established in *EPSCA, supra*, and refined in *H.E. Vannatter Ltd. and U.A.W., Local 251 (Palimaka) (Re), supra*, and in *Metropolitan Separate School Board and O.P.S.E.U. (Cobban), Re*, (1995) 50 L.A.C. (4th) 378 (Picher), the applicant alleges a breach of the collective agreement with respect to Mr. Keelan has been proved. In addition, in the context of the current amendments to the Code, and specifically to the definition of "age", by the removal of the prior upper limit of 65, effective on December 12, 2006, the introduction of a new policy by Fox with respect to Mr. Keelan's referral and making his age the basis for his rejection is undoubtedly arbitrary, discriminatory and in bad faith.

9. Details of various periods of employment of those member of Local 527 who were over 65 (the list attached to the letter of November 26, 2004 with agreed additions and changes) by Fox substantiates Fox's arbitrariness, discrimination and bad faith because Fox had never applied its policy at all until Mr. Keelan. Many of the examples on that list are persons who turned 65 while employed by Fox at the Bruce but who were not forced to retire or cease employment. Therefore, the retirement policy was applied inconsistently as between 65 year olds and no proper advance notice was given of its implementation with respect to Mr. Keelan.

10. The responding party submits that the Board ought to reject the applicant's argument because it is based upon the concept that it is arbitrary, discriminatory and acting in bad faith for an employer to act in accordance with current law as it will remain until December 12, 2006 when the Code's amendments are effective. This is not a proper standard or test and proof of that is in the analogy with diving speed restrictions – so long as the speed posted is 70, it is permissible to drive at this speed until the speed is lowered to 60.

11. The responding party argues that the key date is November 9, 2004, the date of Fox's letter to the applicant. After that date "the policy" was in effect and if a person over the age of 65 were dispatched from any of the unions that are party to the collective agreement, they would be rejected. The responding party highlighted that no one was "thrown off the job", just that referrals would be rejected. In the responding party's view all of the case law and all of the statute law supports the legitimacy of this policy of Fox, especially since there was no prohibition in the law against instituting it in November of 2004.

12. The responding party asserts a different interpretation of the list attached to the applicant's letter of November, 2004(with agreed changes) - it shows that everyone of them, with only two exceptions, were gone from employment by November 2004 and neither of the circumstances of these two were at variance with what happened to the grievor, the rejection of a referral of a worker over the age of 65 as of the date of referral.

13. The responding party argues that Fox's policy was to not accepting referrals of those over the age of 65 but allowing "natural attrition" to deal with those who became 65 while working for Fox on the Bruce Power site. The *EPSCA* decision, relied upon by the applicant, in essence established that the policy of Bruce Power to retire its people at age 65 was valid under the EPSCA collective agreement that applies to all trades, including the applicant. Some contractors bound by this collective agreement were free to implement their own policy with respect to retirement. The responding party asserts that any individual company's retirement policy was not "an issue" for EPSCA to deal with; the one exception being the Letter of Understanding not applicable to Mr. Keelan's circumstances anyway, but demonstrating that the applicant understood individual employers would have their own individual policies.

14. Fox's policy is not breach any provision of the collective agreement, which only deals with contributions to the applicant's pension plan. Fox's policy is not prohibited by law and notice was given to the union of its implementation in November of 2004. Mr. Keelen's rejection was based upon that. Thus, in accordance with the *Vannatter* test all that is left is to make a "judgment call" on the sufficiency of notice in advance of his rejection. In November of 2004 Fox announced that it would not accept a referral of anyone over age 65 and then in March of 2006 Mr. Keelan is dealt with under the policy. The responding party emphasized that at both points in time and indeed as of the day of hearing, April 10, 2006 all of this is "legal" under the Code.

15. The applicant's reply is that the responding party mischaracterizes the current law. The applicant asserts that the proper way of looking at it is that the law has deleted the upper limit of the definition of "age" and its implementation will be December 16, 2006. This circumstance prohibits an employer from implementing a policy in conflict with these provisions during the intervening year. It also makes no labour relations sense that persons over the age limit of 65, such as Mr. Keelan, would be in a worse position after the amendment was passed by the legislature.

16. Fox may want to "clean house" because of this amendment, i.e., prior to December 16, 2006 not employ those over the age of 65 so. It did not have such a policy as this prior to the amendment of the Code and therefore it is arbitrary, discriminatory and in bad faith for Fox to reject Mr. Keelan simply on the basis that he is over 65. In March of 2006 Fox should not be given the latitude to change its policies in contradiction with these amendments.

17. The applicant also added that the responding party's distinction between the implementation of a policy regarding work referrals and implementation of a policy for existing employees is plainly arbitrary because "age 65 is still age 65" and the notice it gave was of a policy not to "hire or employ" anyone over that age. Thus a distinction between decisions upon referrals and continuing employment does not applying that policy as stated. Therefore, the notice is unclear and inadequate, making Fox's action toward Mr. Keelan arbitrary. Mr. Keelan is the first referral out of the hiring hall rejected due to this policy subsequent to November, 2004

at the Bruce. The two "exceptions" the responding party mentioned are irrelevant but nevertheless demonstrate that there is no cogent distinction by Fox between retention in employment of those over 65 and rejection of referrals of those over 65. Thus Fox action with respect to Mr. Keelan was based upon this distinction is arbitrary, discriminatory and in bad faith.

18. Finally the applicant argues that this case should not simply be analyzed on the same terms as the *H.E. Vannatter Ltd.* decision, as the responding party's argument suggests, because there was no impending change to the Code at the time of that decision. The applicant underlined that its reference to that decision was simply for its application and analysis of the issue of notice.

Decision

19. We find that Fox gave notice in November of 2004 that it was no longer going to "hire or employ workers at the Bruce Power facility in contradiction of the Bruce Power Age 65 Retirement Policy" and specifically elaborated that its policy would "pertain to the employment of any workers over the age of 65 dispatched form any of the unions that are party to the EPSCA agreement".

20. The applicant almost immediately gave notice to Fox that neither Fox nor Bruce Power consistently and appropriately implemented any retirement policy in the past with respect to its workers and this was contrary to the collective agreement. Counsel for Fox admits that after the announcement of this policy, no one was "thrown off the job" by Fox once they became 65. Thus we find that the policy announced in November of 2004 was never fully implemented – effective for one member of the applicant who was already a Fox employee and was over 65. Although the responding party tried to portray its policy as *only pertaining* to referrals, the fact is that the policy was broader than that, i.e. not to "hire or employ" workers in contradiction of Bruce Power's policy. The applicant obviously interpreted it that way and immediately asserted a history of inconsistent application with respect to those in the employ of Fox and breach of the collective agreement. Indeed, Fox may have chosen the line of least resistance in the face of this by allowing "natural attrition" to take care of the one person already in its employ who was 68.

21. The applicant's argument that Article 8.6(b) and (c) set a higher standard for the rejection of someone in Mr. Keelan's circumstances will not form the basis of this decision since we have accepted the argument based upon the traditional test in *EPSCA, supra*, and *H. E. Vannatter Ltd., supra*.

22. The impending amendment to the Code (pursuant to *Ending Mandatory Retirement Statute Law Amendment Act, 2005*) received Royal Assent on December 12, 2005 and an intervening year was set until the new definition of "age" would come into force. This time lapse gives the affected groups, including employers, an opportunity to get their policies and administrative processes aligned with the new circumstance of the age of 65 no longer being the end point of the Code's protections.

23. Rather than refrain from applying part of a policy established almost a year and a half earlier, i.e., not accepting referrals of those over the age of 65, after Royal Assent in December of 2005, Fox instead decided that, for the first time since the date it believed it had legally announced the policy in 2004, it would reject the referral of Mr. Keelan. It is clear that Fox thus interpreted the year between Royal Assent and the effective elimination of its perceived policy in

December of 2006 as "a last chance" to exercise its time-limited rights under the current provisions of the Code. It is clear that if Mr. Keelan were not rejected at that time, Fox knew it would be unable remove him from its employ on the basis of his age. Not only would not only have to face the allegations of the applicant raised in November of 2004, it would also be subject to the expanded prohibitions of the Code after December 12, 2006.

24. We agree that this constitutes a violation of the standard of conduct established since the *EPSCA* decision, supra. The decision to implement its policy in the shadow of legislation that would afford the protections of the Code to referrals like Mr. Keelan was plainly made in bad faith and is essentially arbitrary. Fox's actions went in the opposite direction to those amendments and its only rationale for dong this was to say that it was not "the law" yet.

25. Even if the impending amendments did not exist, the actions of Fox with respect to Mr. Keelan were discriminatory and taken in bad faith because there was no equality of treatment with the individual who had reached 68 years of age. That member of the applicant was not forced to stop working for Fox and earning an income under the provisions of the collective agreement but Mr. Keelan simply by being over 65 years of age was refused the opportunity to work like him. There is no rational distinction between these two and therefore the decision is discriminatory and arbitrary.

26. In addition, the notice by Fox of November 2004 was not adequate in light of its subsequent actions not to end the employment of those who turned 65 while in its employ. Effectively by acting in this way, especially in the face of the applicant's accusation of breach of the collective agreement, it effectively withdrew the notice. When the applicant's assertions in its letter of November 28, 2004 about Fox's past decisions not to end employment of those who were over the age of 65 are taken into account, it would be reasonable for the applicant, as well as Mr. Keelan and others similarly situated, to conclude that Fox had abandoned its intention to change its approach to the employment of those who exceeded the age of 65.

27. Therefore, we conclude that the rejection of Mr. Keelan is a breach of the collective agreement and consequently the grievance is upheld. We note that the order requested with respect to the U.A./EPSCA Collective Agreement being binding upon Fox may no longer be needed in light of item 1 of the agreed facts.

28. If the parties cannot agree upon the assessment of damages flowing from this determination, they may apply to have such determination be made by the Board. Meanwhile this matter is adjourned *sine die* for a period of a year and will be dismissed without notice to the parties at the end of that period unless prior to that time either party requests the Board's assistance with respect to the assessment of damages or other relief appropriate in the circumstances.

0330-04-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **John Boddy Developments Ltd.**, Responding Party.

Certification – Construction Industry – Practice and Procedure – Reconsideration – Status – During the hearing of status disputes in this application for certification, the applicant sought to admit a cleaning contract that would indicate one of the witnesses was cleaning a certain residence at the time of certification – The witness had already concluded her testimony and had claimed she did not clean the residence in question – The respondent objected to the admissibility of the contract on the basis of the rule in *Browne v. Dunn* and the Board sustained the objection – At the next hearing date, the applicant sought reconsideration of the procedural ruling – The Board considered the rule's proper application in the certification context: at no time had the applicant introduced the evidence during cross-examination of the witness; the document was not relevant to any issue other than impeaching the witness' testimony; the contract went to the essential issue of whether the witness was performing bargaining unit work on the date of application – Finding the rule applied, the Board held that serious prejudice would be caused by allowing the contract to be entered into evidence: the applicant would be allowed to split its case and the already two-year-old application would be further lengthened, thereby compromising the efficiency of the Board's certification process – In contrast, the prejudice suffered by the applicant was minimal – Although not determinative of the matter, the Board also noted that the applicant had failed to follow Rule 8.3 of the Board's Rules of Procedure – Having regard to the purpose of the Act and labour relations principles, the Board confirmed its original ruling that the evidence was inadmissible – Reconsideration denied; matter continues

BEFORE: *Jack J. Slaughter, Vice-Chair,* and Board Members *John Tomlinson* and *Alan Haward.*

APPEARANCES: *Lyle Kanee, Harold St. Croix* and *Jorge Vala* appearing for the applicant; *William LeMay* and *Edward Boddy* appearing for the responding party.

DECISION OF THE BOARD; May 31, 2006

1. This is an application for certification in the construction industry filed pursuant to section 8 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") on April 24, 2004.

2. Pursuant to the decision of the Board (differently constituted) dated April 29, 2004, a representation vote was held on May 3, 2004. The Board found that the responding party's section 8.1 notice was numerically significant and directed that the ballot box be sealed.

3. At the representation vote, 24 persons cast ballots. There remain 21 persons whose status as an employee in the bargaining unit is in dispute between the parties.

4. By decision dated September 30, 2004, the Board (composed of the current Vice-Chair sitting alone) denied the responding party's request that the Union's status disputes be dismissed, and its alternative request for further particulars thereof. The Board directed that the hearing in this matter (then set for four days of hearing commencing on November 16, 2004), proceed as scheduled.

5. By written agreement dated November 16, 2004, the parties agreed to adjourn the first two days of hearing in order to enable the parties "to produce the documents to each other as agreed by counsel".

6. By letter dated December 1, 2004, the parties agreed to adjourn the third scheduled day of hearing. The Board adjourned the fourth scheduled day of hearing because of its own administrative requirements.

7. The hearing before this panel commenced on April 29, 2005. The parties agreed that the Board should first deal with the status of five particular individuals. The Board heard evidence from three witnesses on that day: Judy Anstey, Scott Murray, and William Johnston.

8. The Board set further hearing dates for June 1 and 2, 2005. These dates were adjourned by agreement of the parties to accommodate the responding party's counsel. The Board rescheduled this matter for hearing on August 4 and 5, 2005. These dates were adjourned by the Board due to a scheduling conflict for one of the panel members.

9. The Board again rescheduled this matter for hearing on September 1 and 2, 2005. These dates were adjourned as a key witness was unavailable due to back surgery. The hearing was finally rescheduled for December 5 and 6, 2005.

10. On December 5, 2005, the responding party called William Anstey and John Cernele as its witnesses. It then closed its evidence on the first portion of the case. Next, the applicant called Harold St. Croix as its witness. Mr. St. Croix is a Business Representative and Organizer employed by the applicant, who was involved in its campaign to organize the responding party's construction labourers.

11. During the course of examination-in-chief, applicant's counsel asked Mr. St. Croix a question regarding his observations of William Anstey on the date of application. Counsel for the responding party objected to this question on the basis of the rule in *Browne* v. *Dunn* (1893) 6 R. 67 (H.L.), because Mr. Anstey was not put on notice of this evidence during his cross-examination. The Board upheld the objection, ruling orally that Mr. Anstey should have been given notice of this forthcoming evidence and was not. Accordingly, it would violate the principle of fairness to Mr. Anstey enunciated by the rule in *Browne* v. *Dunn* to admit Mr. St. Croix's evidence where Mr. Anstey would not be in a position to respond to it. The applicant does not seek reconsideration of this ruling.

12. The evidence of Mr. St. Croix was then completed without further incident. The applicant then called Edward Boddy, the President of the responding party, as its next witness.

13. During the examination-in-chief of Mr. Boddy, the applicant sought to introduce into evidence and ask questions about a document described as a "cleaning contract" between B & J Cleaning Services Inc. and the responding party. The document would potentially pertain to the issue of whether Judy Anstey, an employee whose status was challenged by the applicant, was performing bargaining unit work on the date of application. Counsel for the responding party objected to the introduction of the document on two grounds. Firstly, the document was not filed in accordance with the Board's Rules of Procedure. Secondly, the rule in *Browne* v. *Dunn* has been violated as no notice of this document was given to Judy Anstey in her cross-examination,

and the intention of introducing the document is to attack her credibility. Counsel for the responding party stated he had produced the document to the applicant in either December 2004 or April 2005.

14. Counsel for the applicant did not dispute that the document had been produced by the responding party during its productions. However, he stated that he only found it "over the lunch hour" on December 5, 2005. He asserted Ms. Anstey did not create, and could not identify the document. He argued that Mr. Boddy could identify it, and there was no prejudice to the responding party, which could recall Ms. Anstey as a reply witness.

15. The Board upheld the responding party's objection in an oral ruling, which it now reproduces:

> The objection is sustained.
>
> Firstly, the applicant is attempting to introduce a document that was in its possession prior to the initial testimony of Judy Anstey that is intended to impeach the credibility of Ms. Anstey, and possibly William Anstey as well. It should have been put to both of those witnesses in cross-examination but was not. This offends the principle in *Browne* v. *Dunn* and the principle of fairness to the witnesses.
>
> Furthermore, it would be permitting the applicant in a sense to split its case and put the responding party in a position of calling at least two witnesses again to address an issue that could and should have been covered in the cross-examination of the Ansteys.
>
> The objection is therefore upheld.

After the Board's oral ruling, the applicant asked no further questions of Mr. Boddy. The Board and the responding party understood that Mr. Boddy's evidence was completed. The Board then adjourned for the day late in the afternoon of December 5, 2005.

16. At the commencement of the hearing on December 6, 2005, the applicant submitted a very extensive argument why the Board should reconsider its ruling set out in paragraph 15 above. Counsel for the responding party did not become aware of the reconsideration request until the morning of December 6, 2005. The Board offered him an adjournment to prepare a response, but he declined the opportunity after taking instructions from his client. The Board heard complete argument on the applicant's reconsideration request, and reserved its decision, which is now provided below.

THE RULE IN BROWNE V. DUNN

17. Although there were several speeches made by the Law Lords in *Browne* v. *Dunn*, the rule has been summarized by the Ontario Court of Appeal as follows:

> This well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness box.

R. v. *Henderson* (1999), 44 O.R. (3rd) 628 at p. 636 per Labrosse J.A; see also *R..* v. *Marshall* (2005), 77 O.R. (3rd) 81 (C.A.).

ARGUMENT OF THE APPLICANT

18. The applicant argues that the rule in *Browne* v. *Dunn* is not a rule of evidence, but a procedural rule of fairness. Counsel argues that there have been a "disproportionate number" of cases in Ontario where the rule has been applied. Counsel says the rule should be approached with caution.

19. Counsel submits the Board should look at fairness or prejudice to the witness and the parties. The rule applies where the questioning party has evidence it knows will contradict or impeach a witness' testimony, and the evidence should have been put to the witness to provide the witness an opportunity to explain it, qualify it, or deny it. The rule does not apply where it is not clear that the questioning party intends to impeach the witness' story through the introduction of the new evidence.

20. Counsel maintains that even if the questioning party has offended the rule in *Browne* v. *Dunn*, it should still generally be allowed to introduce the new evidence, subject to the right of the opposing party to call reply evidence.

21. The applicant provided the Board with the following cases in support of its argument: *Community Lifecare Inc.* (2001), 98 L.A.C. (4th) 365 (Gorsky); *Machado* v. *Berlet* (1986), 32 D.L.R. (4th) 634 (Ont. H.C.); *Humber Memorial Hospital* (1995), 38 C.L.A.S. 85 (Kaufman); *The Board of Education for the City of Windsor* [1996] O.L.R.D. No. 2331; *Maple Leaf Poultry* (1998), 70 L.A.C. (4th) 249 (Barrett).

22. The applicant argues that the responding party produced the cleaning service contract in the form of an invoice from B & J Cleaning Service, which makes reference to Lot 33, the house allegedly cleaned by Judy Anstey on the date of application. No witness mentioned the document. There is nothing on the face of the document that indicates any witness other than Mr. Boddy would have knowledge of it. The applicant has no background knowledge of the document and needs the responding party to explain it.

23. It appears to the applicant this is a relevant document. The applicant acknowledges that in a sense it is engaging in a fishing expedition as on its face the contract does not necessarily contradict anyone, but says the document does require an explanation from Mr. Boddy.

24. The Chair asked whether it was the applicant's position that the document was being introduced to prove someone other than Ms. Anstey cleaned the house on Lot 33 on the date of application. The applicant confirmed this was the purpose of introducing the document. The

Chair then asserted that this would impeach Ms. Anstey's credibility and counsel agreed it would. However, counsel argued that while counsel is obligated to put a "smoking gun" to a witness, in this case the applicant does not know whether it has a "smoking gun", because the document is unclear on its face.

25. The applicant says on these facts the rule in *Browne* v. *Dunn* does not apply, because it is not clear on its face that the document would impeach Ms. Anstey's credibility. Therefore, the applicant should be allowed to ask Mr. Boddy questions about it.

26. In the alternative, the applicant argues the Board should still permit the questions even if it finds the rule in *Browne* v. *Dunn* has been offended. The applicant says that the document is an important piece of evidence and the Board should want to hear Ms. Anstey's response to it. There is prejudice to the applicant from disallowing the document. Any prejudice to the responding party from the late introduction of the document can be remedied by giving the responding party the right to call reply evidence.

27. For all these reasons, the applicant asks the Board to reconsider its ruling.

ARGUMENT OF THE RESPONDING PARTY

28. The responding party submits that the Board should not reconsider its decision. The responding party says there are three separate grounds why the Board should not allow the applicant to attempt to introduce the B & J Cleaning Service Contract into evidence or to ask Mr. Boddy questions about it.

29. By way of background, the responding party submits that certification applications before the Board are subject to a stringent set of procedural rules to ensure they proceed expeditiously. To this end, the responding party produced a large volume of documents in both December 2004 and April 2005. At the latest, the B & J Cleaning Service Contract was produced to the applicant ten days prior to the first date of hearing in April 2005. Yet the applicant made no mention of it until belatedly attempting to introduce it through Mr. Boddy.

30. The responding party's first ground of objection is that the applicant is introducing the document in a manner that violates Rule 8.3 of the Board's Rules of Procedure, which states:

> **8.3** Each party must file with the Board not later than ten (10) days before the first date set for hearing or consultation two (2) copies of all documents upon which it will be relying in the case. At the same time, each party must deliver copies of those documents to each of the other parties.

31. The responding party's second ground of objection is the rule in *Browne* v. *Dunn*. The B & J Cleaning Service Contract is only relevant if it impeaches Judy Anstey's credibility, which brings the late introduction of it squarely within the rule in *Browne* v. *Dunn*, because of the applicant's failure to bring it to her attention during her cross-examination. If the contract does not impeach her credibility, it is irrelevant as it does not relate to any other matter in issue before the Board.

32. The responding party's third ground of objection is prejudice. There is no other evidence before the Board that impeaches Ms. Anstey's credibility. If the Board were to permit the applicant to introduce the contract now, the responding party claims it would be prejudiced in three ways:

> (a) Ms. Anstey testified eight months ago and was cross-examined, so that she would be at a distinct disadvantage if she were recalled to testify in reply.
>
> (b) The applicant would be allowed to split its case.
>
> (c) This would be permitting the applicant to engage in a fishing expedition 3/4 of the way into the case.

33. For all those reasons the responding party urges the Board not to reconsider its ruling.

ANALYSIS

34. The Board's decision to accept or reject a piece of evidence in any particular case must be made pursuant to the statutory mandate given to the Board under the Act. Furthermore, such determination is not made in a vacuum, but must be informed by principles that support the sound conduct of labour relations in Ontario. Indeed, the Courts have recognized for over half a century, since the Privy Council's decision in *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.*, [1948] 4 D.L.R. 673, that labour relations tribunals perform a specialized function in the field of industrial relations, which is distinct from that of the courts.

35. Therefore, the starting point of the Board's analysis must be found in the Act, its governing statute. The Board finds the following provisions of the Act are relevant to determining the issue now before the Board:

> **2.** The following are the purposes of the Act:
>
> 6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
> 7. To promote the expeditious resolution of workplace disputes.
>
> **111.** (1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.
>
> (2) Without limiting the generality of subsection (1), the Board has power,
>
> (e) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not;

36. The Board thus has a broad discretion on whether to accept or reject any particular piece of evidence. However, this discretion is not untrammelled. It must be exercised having due regard to the specific circumstances surrounding the introduction of the evidence, the applicable labour relations principles, and the law of evidence, particularly as developed and applied by the Board. One aspect of the law of evidence that has been applied by the Board in numerous cases is the rule in *Browne* v. *Dunn.*

37. The Board agrees with the applicant that the rule in *Browne* v. *Dunn* is a procedural rule of fairness. Indeed, Lord Herschell's speech in *Browne* v. *Dunn* specifically adverted to this where he wrote:

> My Lords, I have always understood that if you intend to impeach a witness you are bound, while he is in the box, to give him an opportunity of making any explanation which is open to him and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

38. The Board will first address whether the rule in *Browne* v. *Dunn* applies on the facts of this case, and then whether in the event it is applicable if the applicant should nonetheless be allowed to introduce the cleaning contract into evidence, subject to the right of the responding party to call reply evidence. The responding party's specific objections will be discussed within the context of this framework.

39. The Courts in Ontario and this Board have had many opportunities to consider the meaning and application of the rule in *Browne* v. *Dunn.* The rule has been raised and ruled upon on numerous occasions in criminal prosecutions, civil litigation, and administrative tribunal proceedings in Ontario. The context is important. The adjudicator must be aware of, and balance, the competing considerations to ensure the rule is applied in a manner that is both fair to the parties and promotes the efficient and expeditious conduct of the particular proceeding.

40. In *Machado* v. *Berlet, supra,* Mr. Justice Ewaschuk discussed the application of the rule with specific regard to documentary and written evidence in a civil action at p. 637 where he wrote:

> The rule in *Browne* v. *Dunn* imposes on an opposing party the duty of giving a witness an opportunity of explaining evidence which the cross-examiner intends to use later to impeach the witness' testimony or credibility. In other words, a cross-examiner must expressly put to the witness the substance of evidence which is to be later tendered in an attempt to contradict the witness. Thus, a witness' testimony cannot later be impeached by contradictory evidence unless the contradictory evidence has been previously put to the witness in an express and particularized manner. It is noteworthy that the Supreme Court of Canada has expressly adopted the rule in *Browne* v. *Dunn* in *Peters* v. *Perras et al.* (1909), 42 S.C.R. 244, 13 Alta. L.R. 80, as

> has at least one other level of Canadian courts (e.g., *United Cigar Stores Ltd.* v. *Buller et al.*(1931), 66 O.L.R. 593, [1931] 2 D.L.R. 144 (C.A.)).
>
> I am satisfied that defendants' counsel has breached, though not totally, the rule in *Browne* v. *Dunn.* Mr. Mollison did, indeed, put to the plaintiff the various activities depicted in the surveillance films, but in a very generalized and superficial way. He asked the plaintiff whether he could run, shovel snow, and scrape ice off windshields.
>
> It is my view that the rule of fair advocacy enunciated in *Browne* v. *Dunn* requires more. For example, if opposing counsel has written materials contradicting the witness, counsel must put the written materials to the witness and must point out the contradiction to the witness' testimony. …

41. This Board has applied the rule in *Browne* v. *Dunn* consistently over at least the last two decades, dating from its decision in *Luciano D'Alessandro and Donato Marinaro*, [1985] OLRB Rep. Feb. 241.

42. In *John Clark*, [1991] OLRB Rep. May 598, the Board discussed the purposes and history of the rule in a labour relations context and developed a two-pronged test for its application at paragraphs 2 to 8 thereof:

> 2. The evidentiary issue which requires this interim ruling arose when the respondents began to call evidence in defense of the complaint. The Representatives Association of Ontario's [RAO] first witness Dan Garvey, began to give evidence concerning events and conversations which had been attested to by all of the complainants and other supporting witnesses. In some aspects of Mr. Garvey's evidence, his testimony directly contradicted the evidence given by or on behalf of the complainants. In those situations, the evidence that Mr. Garvey gave had been suggested to the complainants or their witnesses during their cross-examinations and they had had the opportunity to react to the evidence. However, other aspects of Mr. Garvey's testimony introduced evidence of conversations and circumstances which had not been suggested to or put to the complainants or their witnesses when they were testifying. For example, Mr. Garvey added further details to conversations that had been the subject of extensive cross-examination of the complainants, even though these new details had never been suggested to the complainants. Counsel for the complainants took objection to this type of evidence arguing that it offended the rule in Browne v. Dunn (1893), 6 R. 69 (H.L.). Counsel for the complainants argued that the rule in Browne v. Dunn should prevent the respondents from calling any evidence that was

different from evidence given by the complainants and that had not been suggested to or put to the complainants while they were on the witness stand. Counsel for the complainants argued that the rule in Browne v. Dunn is one of fairness and expediency to ensure a witness has a chance to respond to evidence that will be called against him or her and to ensure that the trial is conducted in a controlled and practical way. The Board was reminded of its policy of applying the Browne v. Dunn rule as was done in the case of Luciano D'Alessandro and Donato Marinaro, [1985] OLRB Rep. Feb. 241.

3. Counsel for the RAO responded to the objection by arguing that the evidence his client wished to introduce did not offend the rule in Browne v. Dunn because it was not being tendered to impeach the complainants' credibility or contradict their testimony. Instead, it was said that the evidence was being offered to add further details and recollections of conversations than had been introduced by the complainants. Further, counsel for the respondent RAO undertook that the Board would not be asked to impute any lack of credibility against the complainants with regard to any of the details given by the respondents which had not been put specifically to the complainants. Counsel for Representatives Association of Ontario also introduced the case of Machado v. Berlet et al. (1986) 15 C.P.C. 2d 207 (H.C.J.) and J. Sousa Contractor Limited, [1988] OLRB Rep. October 1027.

4. Counsel for the respondent R.W.D.S.U. adopted the argument of counsel for the Representatives Association of Ontario and argued that the evidence sought to be introduced should not be seen as contradicting the evidence called by complainants or be seen as evidence that would be used to impeach the credibility of the complainants. Instead, the Board was asked to consider the evidence as "filler" or details being offered on issues that were not matters of credibility and which could be used in conjunction with the evidence of the complainants on the critical points.

5. In reply, counsel for the complainants argued that no meaningful distinction can be drawn between evidence offered to "contradict" the testimony of the complainants from evidence that would be "different" than the evidence of the complainants. Mr. Wray expressed concern over the possibility of having to recall the complainants to deal with some of the statements and thus prolonging an already very lengthy proceeding.

6. The rule in Browne v. Dunn, supra, imposes a duty on an opposing counsel to give a witness an opportunity to explain evidence which will be called later to impeach the credibility or

testimony of that witness. Fundamentally, the rule is one of fairness and is meant to exclude evidence that was not first offered to an opposing witness to give him/her a chance to rebut it. It is useful to quote the original rule and its rationale from Browne v. Dunn where Lord Herschell explained:

> "Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that IF YOU INTEND TO IMPEACH A WITNESS YOU ARE BOUND, WHILST HE IS IN THE BOX, TO GIVE HIM AN OPPORTUNITY OF MAKING ANY EXPLANATION WHICH IS OPEN TO HIM AND AS IT SEEMS TO ME, THAT IS NOT ONLY A RULE OF PROFESSIONAL PRACTICE IN THE CONDUCT OF A CASE, BUT IS ESSENTIAL TO FAIR PLAY AND FAIR DEALING WITH WITNESSES. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling.
>
> [emphasis added in uppercase text]

The rule in Browne v. Dunn is applied in two specific ways. First, the rule is applied with regard to using evidence to impeach the credibility of a witness. The decision in Machado v. Berlet, et al. supra, makes this clear where it is said at page 218:

> The rule in Browne v. Dunn imposes on an opposing party the duty of giving a witness an opportunity of explaining evidence which the cross-examiner INTENDS TO USE LATER TO IMPEACH THE WITNESS'S

> TESTIMONY OR CREDIBILITY [emphasis added in uppercase text]. In other words, a cross-examiner must expressly put to the witness the substance of evidence which is to be later tendered in an attempt to contradict the witness. Thus, a witness's testimony cannot later be IMPEACHED BY CONTRADICTORY EVIDENCE unless the contradictory evidence has been previously put to the witness in an express and particularized manner. ...
>
> [emphasis added in uppercase text]
>
> In the Machado v. Berlet et al. case supra, Mr. Justice Ewaschuk explained what he means by "impeach" with respect to the application of the rule in Browne v. Dunn by saying impeach means "to call into evidence the veracity of evidence given by a witness by calling evidence to contradict, challenge or impugn the witness's prior testimony".
>
> 7. A second consideration in the applicability of Browne v. Dunn is whether the to [sic] evidence relates to substantive or significant facts rather than to collateral facts. This is evidenced by the J. Sousa Contractor Limited case, supra, at paragraph 23 and 24 where the Board, in determining the applicability of the rule, weighed the significance of the fact(s) sought to be contradicted, and whether the issues were "central and not merely collateral" to the substance of the case.
>
> a. The above analysis yields two conclusions. First that the rule in Browne v. Dunn is one of fairness and deals with evidence which is intended to be used or could be used to impeach the credibility of a witness on a particular point. Secondly, the applicability of the rule may depend or relate to the significance or the substance of the facts in issue and whether or not it merely relates to collateral facts. [See also the Practice Note accompanying the Machado v. Berlet decision, supra.]

43. The Board has applied the rule in this manner in certification proceedings. As the Board stated in *Mason Homes Ltd.*, [1999] O.L.R.D. No. 3430 at paragraph 11, questions that go to whether a person is properly on a list of employees are questions that relate to a substantial or core issue in a certification application, and cannot be considered merely collateral (see also *Capital Environmental Resources Inc.*, [2001] O.L.R.D. No. 3356).

44. The Board will now focus on the facts of this case. The responding party asserts Judy Anstey should be included as an employee in the bargaining unit because she was performing the work of a construction labourer on the date of application. The applicant contends she was not.

In direct examination, Ms. Anstey testified she was employed cleaning up garbage and construction debris for the responding party on Lot 33 on the date of application. The cross-examination of Ms. Anstey by the applicant's counsel was relatively brief. She was asked about her relationship with her husband, William Anstey, whose status as an employee of the responding party is also challenged by the applicant in this matter (the applicant asserts he performs managerial functions within section 1(3)(b) of the Act). The applicant reviewed with Ms. Anstey her employment history with the responding party, including her rate of pay, her regular days of work, and her customary duties. The applicant directed much of its cross-examination towards the type of cleaning Ms. Anstey did, including whether it was mainly with respect to model homes, and the extent to which it involved construction debris. The applicant asked Ms. Anstey about her time cards, and they were entered into evidence without objection. At no time in the cross-examination of Ms. Anstey did counsel for the applicant suggest someone other than Ms. Anstey cleaned up Lot 33 on the date of application. At no time in Ms. Anstey's cross-examination did counsel for the applicant refer to the cleaning contract the applicant now seeks to introduce in any manner, directly or indirectly.

45. Furthermore, the cleaning contract was not referred to in any way in the prior cross-examination of any other witness. Although counsel for the applicant says the document is not clear on its face, the document is not relevant to any issue in this proceeding unless it addresses whether Judy Anstey was at work cleaning the house on Lot 33 on the date of application. Therefore, as counsel for the applicant ultimately conceded, the purpose of introducing the document is to impeach Ms. Anstey's credibility.

46. These facts bring the instant case squarely within the principles of the rule in *Browne* v. *Dunn* as enunciated by *John Clark* to apply in a labour relations context. The applicant seeks to introduce a written document that was not only not put to the witness in "an express and particularized manner", but not put to her at all. The purpose of introducing the document is to impeach the witness' credibility. The document goes to a substantial and significant issue in this certification proceeding, namely whether Ms. Anstey is to be included as an employee in the bargaining unit.

47. The inclusion or exclusion of an employee from a bargaining unit is always a central issue in a certification application. The applicant's right to certification is dependent upon proof of majority support by the employees in the bargaining unit. Therefore, a trade union applicant knows, or certainly ought to know, it must put its best evidence forward in a timely way to challenge a person it says should be excluded from the bargaining unit. An applicant cannot "lie in the weeds" and fail to confront a challenged employee while she is testifying with contradictory evidence which goes to the basic and essential fact of whether she was performing bargaining unit work on the date of application, only to introduce it later after her testimony is complete. Such conduct is completely inimical to the co-operative and expeditious resolution of certification applications. Hence, the conduct of the applicant in seeking to belatedly introduce the cleaning contract clearly offends the rule in *Browne* v. *Dunn* as applied in a labour relations context.

48. However, even where the rule in *Browne* v. *Dunn* applies, the adjudicator has a discretion to allow the introduction of the impugned evidence, subject to providing the opposite party with an opportunity to call reply evidence: *Community Lifecare, supra*; *Windsor Board of Education, supra*; *Prairie Plumbing Ltd.* [2004] OLRB Rep. Sept./Oct. 965. In deciding whether

to exercise this discretion, it is incumbent on the Board to consider the nature of the breach, the circumstances surrounding it, the potential prejudice to the opposite party, and the impact on the orderly conduct of the litigation of this certification application. The evidence should be rejected where it would be unjust to admit it: *Community Lifecare, supra.*

49. The Board does not believe that applicant's counsel was engaging in subterfuge or attempting to "sandbag" Ms. Anstey. However, it is utterly unsatisfactory for an applicant to assert it only "found" a relevant document after the responding party had closed its case, where the responding party had produced the document in question eight months earlier in response to a production request from the applicant itself. The circumstances surrounding the breach of the rule certainly do not provide the Board with cause to relieve against the application of the rule in *Browne* v. *Dunn*. Indeed, they point in quite the opposite direction.

50. Furthermore, there is real prejudice to both the responding party's ability to present its case, and the Board's efficient conduct of this proceeding. The responding party would be put in the position of having to recall Judy Anstey, and possibly William Anstey as well. Both witnesses would be giving evidence a second time well after their initial testimony. This would allow the applicant a second cross-examination and effectively give it the opportunity to split its case. It would also lengthen and complicate a construction industry certification application that is already close to two years old. Thus, the responding party would be put at a distinct disadvantage and the integrity of the efficiency of the Board's certification process would be compromised.

51. It is apposite to refer to the commentary of the Board in *Mason Homes, supra*, at paragraph 13, much of which is applicable to the situation in this case:

> 13. The only means of rectifying Local 183's failure to put the evidence in question to Mr. Ashton and Mr. Fernandes was to have the two individuals recalled. As of the date this issue arose, this matter had already been the subject of a number of hearing days. A number of additional days had been set. Recalling Mr. Ashton and Mr. Fernandes would have resulted in the resolution of this matter being further delayed and imposed additional expense and inconvenience on the parties. The rules of evidence are designed in part to ensure that litigation proceeds in a manner which is not only fair to all of the participants but is expedient as well. The rule in *Browne* v. *Dunn* is not an onerous one and is quiet easily complied with. The Board was of the view that there was no basis for allowing Local 183 to rectify the error by recalling the witnesses. As a result, we ruled that we would not accept evidence that had not been properly put to the witness that it was being called to contradict.

52. In summary, to allow the cleaning contract to be introduced subject to the right of the responding party is not appropriate in this case for several reasons. To do so would cause serious prejudice to both the responding party and Ms. Anstey. It would permit the applicant a second cross-examination of Ms. Anstey. The applicant would have the advantage of reviewing its notes

of the first cross-examination, while Ms. Anstey's memory would potentially be weaker, as her second appearance in the witness box would be over a year after her first. The applicant would be effectively allowed to split its case. Mr. Anstey might have to be recalled as well. All this additional evidence would also result in practical, financial and administrative problems for the responding party and delay in the conduct of the certification application. Thus the prejudice is substantial.

53. The Board must also give significant weight to the fact that the late introduction of the cleaning contract is directly attributable to inadvertence on the part of the applicant. The responding party produced the contract to the applicant in advance of the first day of hearing. It bears on what the applicant had to know was a serious issue in the case. To allow its belated introduction now would undermine the integrity of the Board's production procedures, as well as the conduct of certification applications. The only prejudice to the applicant is the loss of the opportunity to introduce one piece of evidence in respect of one of the numerous persons whose employee status is challenged in this matter, where the applicant failed to bring forward the evidence in a timely manner due to its own inadvertence.

54. Hence, the prejudice/fairness calculus weighs heavily against permitting the introduction of the cleaning contract now subject to the right of the responding party to call reply evidence.

55. Furthermore, the Board notes that the applicant did not comply with Rule 8.3 of the Board's Rules of Procedure with respect to the cleaning contract. While the Board would not be inclined to reject introduction of the cleaning contract on that ground alone, it is another factor counting against the applicant.

56. Therefore, the applicable criteria do not favour the Board exercising its discretion to permit the applicant to introduce the cleaning contract subject to reply evidence by the responding party.

57. Finally, the Board must be mindful that this is a reconsideration application. During the course of a hearing, a panel may have occasion to make many rulings on evidentiary points. Unless such a ruling is patently and obviously incorrect, the panel should be loath to reconsider the ruling. Otherwise, the orderly conduct of Board proceedings could grind to a halt. In this case, we are satisfied that our decision was the correct one. There is no valid reason for the Board to reconsider its decision in this matter.

58. For all of the foregoing reasons, the Board confirms its oral ruling sustaining the responding party's objection. The Board finds that the rule in *Browne* v. *Dunn* is applicable, and that it should not exercise its discretion to allow in the impugned evidence subject to reply evidence.

59. Accordingly, the applicant's reconsideration request is dismissed.

60. This matter is referred to the Registrar to schedule further hearing dates.

0663-06-M; 0664-06-U International Brotherhood of Electrical Workers, Local 105, Applicant v. **K2 Electrical Contracting Ltd.**, Responding Party.

Discharge – Interim Relief – Unfair Labour Practice – Both the unfair labour practices complaint and the application for interim relief sought the reinstatement of an employee, who, the IBEW argued, was terminated because of assisting IBEW in an active organizing drive of K2 employees – The Board found the employer's action took place during an organizing campaign and that the pending application raised a serious issue – Although the Board had serious concerns with whether IBEW could establish irreparable harm on the basis of chill to other employees, the Board did find that the union would suffer irreparable harm if the employee, as an insider organizer, was not reinstated – However the Board found that it appeared that the lay-off, suspension or discharge of the employee was unrelated to the exercise of rights under the Act for the following reasons: the employee had only worked for K2 for two hours before leaving for personal reasons; K2's reasons for not rehiring appeared reasonable (a practice for new employees precluded his return one week, and a mistaken belief about a contravention of the *TQAA*, precluded his return the next) – Additionally, IBEW's material attempting to link the non-return to the exercise of rights was problematic – Accordingly, section 98(3) precluded an order of reinstatement – Interim Application dismissed

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Ron Lebi, Mike LeBlanc* and *Ed Cardno* for the applicant; *Erin Kuzz, Jeff Kiernan, Keith Burkhardt* and *Carissa Whiteman* for the responding party.

DECISION OF THE BOARD; June 22, 2006

1. Board file number 0664-06-U is an unfair labour practices complaint filed under section 96 of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, as amended (the "Act"). Board file number 0663-06-M is an application for interim relief under section 98 with respect to the section 96 application. Both applications seek the reinstatement of Ed Cardno.

2. A consultation was held on June 9, 2006. On the agreement of the parties, the day's proceedings were restricted to the application for interim relief.

3. In accordance with the Board's Rules of Procedure, the parties had filed declarations and submissions in relation to the application for interim relief. The declarants were present for the consultation. Counsel for the parties clarified some of the positions which they had taken in response to questions posed by the Board during the course of the consultation.

4. The materials before the Board reveal the following.

5. K2 Electrical Contracting Ltd. ("K2") is a relatively small electrical contractor. Jeff Kiernan is the principal behind K2. At the relevant time it employed approximately 18 to 25 journeymen and apprentice electricians on several work sites.

6. In early May 2006, the International Brotherhood of Electrical Workers, Local 105, ("IBEW") commenced an active organizing drive of K2 employees. Mike LeBlanc is an IBEW organizer who was assigned to this drive.

7. Cardno is an apprentice electrician and IBEW member. Cardno declares that he agreed to assist the IBEW in attempting to organize K2 employees. In May 2006 Cardno contacted K2 seeking employment. Cardno was interviewed by Kiernan on May 12, 2006, and hired to commence work the following week.

8. In his declaration, Cardno states that during the interview he was asked by Kiernan if he was a member of the IBEW. Cardno states that he denied that he was, but asked why it mattered. Cardno further states that Kiernan told him that the IBEW was trying to organize K2 and he could not have IBEW members working for him. For ease of reference, I will refer to this as the first statement.

9. In his declaration, Kiernan denies that he made the first statement or that there was any reference to the IBEW at all during the interview. He also states that his assistant Rebecca Lavigne was present during the interview. K2 filed a declaration from Lavigne. In it, Lavigne also denies that the first statement was made or that there was any reference to the IBEW during the interview.

10. At the consultation, counsel for the IBEW stated that the first statement was not made on May 12, 2006, during the interview, but rather on May 11, 2006, during a telephone conversation between Cardno and Kiernan. Counsel described this as a "clarification" of Cardno's declaration. Counsel for K2 strongly objected to this "clarification", noting that it was only being made after the IBEW had received K2's response to the IBEW's application for interim relief and declarations filed in support.

11. Cardno commenced employment for K2 on May 16, 2006, at a worksite in Milton (the Galaxy Milton job site or worksite). He worked for approximately two hours and then contacted Kiernan by phone to advise him that he needed to leave the worksite and go home to attend to his sick daughter and that he would be unable to work for a few days. Kiernan told him that he could take the rest of the week off. Cardno left the Milton worksite.

12. There is no suggestion that during the two hours Cardno was on K2's worksite he had any discussions with his co-workers about the IBEW or in any other way indicated that he was a supporter of the IBEW, for example through a decal on his hardhat.

13. During a subsequent telephone conversation between Cardno and Kiernan, Cardno indicated that he could return to work the following week (i.e. the week of May 22). Kiernan told Cardno that he would be on vacation that week and that he did not want Cardno to resume work until after he returned (i.e. the week of May 29). Cardno's declaration indicates that this discussion took place on May 16. Kiernan's declaration indicates that this discussion took place on May 17.

14. Cardno's declaration indicates that on May 17 he spoke with Kiernan again and asked

why he could not return to work the following Monday. Cardno's declaration continues that Kiernan's explanation was that Cardno had not informed him that he was a member of IBEW Local 105, and that he did not want any IBEW members working on his worksites while he was working out of the country. For ease of reference, I will refer to this as the second statement.

15. Kiernan declares that during the same conversation in which he and Cardno discussed when Cardno would return to work, he advised Cardno that he did not want any new employees starting on K2 work sites while he was away on vacation. He denies that there was any reference to the IBEW during the conversation or that he made the second statement.

16. Counsel for IBEW stated that it does not dispute that Kiernan was away on vacation the week of May 22. K2 has filed declarations indicating that when a new employee starts for K2 it is Kiernan's practice to visit the job site within the first day or two to touch base with the new employee. Kiernan's declaration also indicates that, to his knowledge, K2 employs five IBEW members, including his brother Randy Kiernan and a former IBEW organizer, Rod Hilton, and has done so for some time.

17. Kiernan declares that on May 18, 2006, while he was at a different job site (the White Oaks job site) having a conversation with his brother Randy (a foreman on the site), Hilton joined in the conversation and without provocation indicated that the new apprentice at the Galaxy Milton job site was an IBEW member. Kiernan declares that he understood this to be a reference to Cardno and that this was the first indication he had that Cardno was potentially a member of IBEW.

18. K2 has filed a declaration from Kyle Nelson, a foreperson for K2 at the Galaxy Milton job site. Nelson declares that on May 23 (i.e. during the week that Kiernan was absent on vacation) a Ministry of Labour inspector visited the Milton Galaxy job site and issued a ticket in the amount of $360.00 against K2 for "failing as an employer to ensure a worker in a scheduled trade is authorized to work in that trade under the *Trades Qualification and Apprenticeship Act*". A copy of the ticket is attached to Kiernan's declaration. Nelson declares that this related to the fact that two K2 employees, Mark Neil and Anderson Gibbs, were not registered apprentices. (Kiernan's declaration indicates that he had believed Neil to be a journeyman and Gibbs to be an apprentice.) In addition, Nelson declares, the inspector told him that the law required a ratio of one journeyman to one apprentice and that K2 was in violation of this requirement.

19. Nelson's and Kiernan's declarations indicate that Nelson promptly contacted Kiernan by phone and advised him of the inspector's visit, including the inspector's warning with respect to the permitted ratio of journeymen and apprentices. Kiernan also declares that he received a call from his brother, at the White Oaks job site, who informed him that a Ministry of Labour inspector had also attended at that site on May 23.

20. Kiernan declares that as a result he took immediate steps to bring the ratios of journeymen to apprentices at the Milton Galaxy and the White Oaks job sites respectively to one to one. Kiernan directed that neither Neil nor Gibbs be permitted to return to the Galaxy Milton job. In order to bring the K2 workforce at the White Oaks job site into a ratio of one journeyman to one apprentice, he directed the lay off of one apprentice (Mr. Roberts). In order to bring the K2 workforce at the Galaxy Milton jobsite into ratio, he decided Cardno would not be recalled back to work in the week of May 29 after Kiernan returned from his vacation. Since the White

Oaks job was ahead of schedule, and the Galaxy Milton job was two weeks away from completion, he decided to transfer a journeyman and an electrician from the White Oaks site to the Galaxy Milton site to complete the work.

21. Both Cardno and Kiernan agree that Cardno contacted Kiernan by phone on the evening of May 28 to inquire about returning to work. Kiernan told Cardno that Cardno would not be returning to work because a Ministry of Labour inspector had informed K2 that it was out of ratio with respect to number of apprentices it was permitted to have. Cardno's declaration indicates that Kiernan told him his employment was terminated. Kiernan's declaration indicates that he told Cardno that he would bring him back to work once there were more journeyman on the site.

22. The only facts offered by the IBEW with respect to the impact of these actions on other K2 employees or its organizing campaign consist of two statements in the declaration of LeBlanc. The first, in relation to the impact of Kiernan's decision not to let Cardno work in the week of May 23 is as follows:

> K2's foremen were made aware of the [sic] Cardno's lay-off or suspension and the real reason for it. K2 employees have also become aware that Cardno was laid-off or suspended because of his union affiliation. Employees have expressed to me their concern for their employment security if they support the union.

The second, in relation to the impact of Kiernan's decision not to let Cardno return to work in the week of May 29 is as follows:

> As with his suspension and lay-off, Cardno's termination is understood by K2 employees to be the direct result of his union membership. K2 employees have expressed their fears to me that support for the union will only lead to their discharge by K2.

23. During the consultation, counsel for IBEW conceded that the union could not say who made K2's foremen aware of the "real reason" for Cardno's lay-off or suspension, and also could not say that it was one or more members of K2's management who had made K2 employees aware that Cardno had been laid-off or suspended because of his union affiliation. Nor did counsel suggest that such information could be provided with respect to the termination of Cardno's employment. Counsel for K2 objected to both paragraphs as being insufficiently particularized.

24. During the consultation counsel for K2 conceded that the TQAA did not in fact necessitate K2 laying off one apprentice at its Milton Galaxy job site. While a regulation to the TQAA does set out the number of apprentices permitted given a certain number of journeyman, the resulting ratio is not strictly one to one. In fact once an employer has three or more journeymen, the number of apprentices permitted is less than one to one. For example, an employer who employs eight journeymen is permitted to employ four apprentices, and for every three journeymen employed after the eighth journeyman, an employer may employ one additional apprentice. But more importantly the ratio relates to the number of journeymen and apprentices employed by an employer over all, not the number employed at any given job site. Counsel

maintained, however, the position set out in Keirnan's declaration, that at the time he advised Cardno that he could not return to work for K2 during the week of May 29, he believed that this was necessary in order to comply with the TQAA.

25. The IBEW filed these applications on May 31, 2006. K2 filed its response to the interim application on June 2, 2006.

Analysis

26. The relevant provisions of section 98 of the Act provide as follows:

> 98 (1) On application in a pending proceeding, the Board may,
>
> (a) make interim orders concerning procedural matters on such terms as it considers appropriate;
>
> (b) subject to subsections (2) and (3), make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate; and
>
> (c) subject to subsections (2) and (3), make interim orders respecting the terms and conditions of employment of an employee whose employment has not been terminated but whose terms and conditions of employment have been altered or who has been subject to reprisal, penalty or discipline by the employer.
>
> (2) The Board may exercise its power under clause (1) (b) or (c) only if the Board determines that all of the following conditions are met:
>
> 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
>
> 2. There is a serious issue to be decided in the pending proceeding.
>
> 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
>
> 4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.
>
> (3) The Board shall not exercise its powers under clause (1) (b) or (c) if it appears to the Board that the alteration of terms

> and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.
>
> (4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.
>
> (5) With respect to the Board, the power to make interim orders under this section applies instead of the power under subsection 16.1 (1) of the *Statutory Powers Procedure Act*.

27. In *Patrolman Security Services Inc.*, [2005] OLRB Rep. Sept./Oct. 818, the Board described the nature of the inquiries which section 98(2) and (3) direct the Board to take as follows:

> 49. Firstly, with respect to section 98(2)1., the Board must determine as a question of fact, whether the circumstances giving rise to the unfair labour practice complaint in the main pending application arose during a campaign to establish bargaining rights.
>
> 50. Secondly, section 98(2)2. requires the Board to review the pleadings of both parties to determine whether there is a serious issue between them to adjudicate in the main application.
>
> 51. Thirdly, sections 98(2)3. and 4. both require the Board to draw conclusions as to the likely prospective consequences to the parties where the relief sought is or is not granted. Both sections require the Board to attempt to anticipate the degree of harm or the labour relations consequences which will occur, as a result of the granting or withholding of relief. Both require the Board to examine the current circumstances of the parties and to then extrapolate to predict likely future outcomes.
>
> 52. Fourthly, section 98(3), crafted with a double negative, requires the Board to determine whether it "appears" that the discipline or discharge was "unrelated" to the exercise of rights under the Act. In the context of an application for interim relief as here, where the main claim is that employees have been discharged ***because*** they were exercising rights under the Act, the term "unrelated" must mean "not causally related" as there could not be other possible degree of "relatedness" that would be relevant or probative.
>
> ....
>
> 67. This type of inquiry [i.e. under section 98(3)] is directed at determining not whether there is a causal relationship as a question of fact, but whether it merely "looks" or 'appears" to be that way on a preliminary review or scan of the information before the Board. In this sense, the inquiry is like a preliminary assessment of the quality or robustness of the evidence likely to be heard and tested in the pending application.
>
> [***Emphasis*** in original.]

28. In this case there was no dispute that the condition set out in section 98(2)1 was met. Accordingly, I find that the employer's actions took place within the context of an organizing campaign.

29. There was also no dispute that the condition set out in section 98(2)2. was met. In any event, the pending application alleges, among other things, that Kiernan made both the first and the second statements and that Cardno was suspended or laid off and then terminated because he was a union supporter. In my view this conduct, if true, in and of itself would constitute a serious breach of the Act. Accordingly, I am satisfied that the pending application raises a serious issue to be decided.

30. With respect to section 98(2)3. and 4., the Board must consider what the current circumstances of the parties are and what the likely outcomes will be if reinstatement is or is not ordered. In my view, for the purposes of the interim application, the determination of each party's circumstances is to be made primarily on the declarations filed by that party, as supplemented through information obtained by the Board at the consultation, and through the application of the Board's experience, in particular with respect to the prediction as to likely future outcomes. This appears to me to be the nature of the exercise which the Board undertook in *Patrolman*.

31. At the consultation, having conceded that the TQAA did not preclude the reinstatement of Cardno, counsel for K2 abandoned the argument that K2 would be harmed by the reinstatement of Cardno. She maintained, however, that the IBEW had not discharged its onus of showing that the requirement of section 98(2)3. had been satisfied.

32. What are the current circumstances of the IBEW? The IBEW's declarations indicate that Cardno is a union member and supporter and that he had agreed to assist the IBEW in attempting to organize the employees of K2. Indeed, it appears that he sought out employment with K2 for this purpose.

33. The IBEW's materials, however, contain no suggestion that during the very brief time that Cardno was on K2's worksite he had any discussions with his co-workers about the IBEW or in any other way indicated that he was a supporter of the IBEW, let alone that he was organizing on behalf of the union. While the IBEW asserts that employees "have become aware" that the suspension or lay-off is related to his union affiliation and that Cardno's termination "is understood" by employees to be related to Cardno's union affiliation, the use of the passive voice in the declarations provides no information as to the basis of these beliefs and counsel for IBEW provided no further information upon questioning by the Board during the consultation. There is no basis for concluding on IBEW's materials that K2 in any way, either directly or indirectly, suggested to other workers that there was a connection between Cardno's union affiliation and his not working the week of May 22 and not returning to work the week of May 29.

34. Does this satisfy the requirement of section 98(2) 3.? In addressing this question, counsel for IBEW first notes that section 98(2)3. directs the Board to consider whether interim relief is necessary to prevent irreparable harm or to achieve other significant labour relations objectives. He argues that the use of the disjunctive means that interim relief may be granted even if

irreparable harm has not been demonstrated, provided that it is necessary to achieve another significant labour relations objective. In any event, he argues that IBEW's materials establish that interim relief is necessary to prevent both irreparable harm and to achieve another significant labour relations objective.

35. The termination of a single union member and supporter in and of itself undoubtedly harms a union organizing drive, since it represents the loss of a card and a ballot in any representation vote ordered by the Board. However this harm is not irreparable: if an application for certification is made, the union may assert that the card be counted and that the individual is entitled to cast a ballot based on the pending unfair labour practices application. Any dispute by the employer as to whether the individual's card may be counted or the eligibility of the individual to vote may be resolved following the representation vote if necessary. Indeed, this is the procedure the Board routinely follows. The harm to a union may, however, be irreparable if other employees are dissuaded from supporting the union because they fear they will face similar repercussions from the employer if they do.

36. Counsel for IBEW argues that the critical fact is that the other K2 employees believe that Cardno was suspended or laid-off and ultimately terminated because he was an IBEW member and supporter. He argues that the irreparable harm to the union arises from this belief in and of itself. Thus, he argues, it is not critical for the union to establish the chain of information which results in employees having this belief. Indeed, he argues, it does not even matter if the beliefs are well founded, in the sense of being correct. What matters is the fact that employees have this belief and have communicated it to the union. He invites the Board to draw upon its own experience and draw the inference that this will have a negative impact upon the union's organizing drive which will be irreparable unless interim reinstatement is granted.

37. In my view, both the source of the information and the degree to which it appears to be well founded are relevant in assessing the degree of harm that a union will experience and whether, in any event, the Board should exercise its discretion to grant interim relief under section 98. Employees can reasonably be expected to give less weight to beliefs based on idle speculation than to beliefs which have some foundation. Equally, the weight employees place on a belief may be expected to depend in part on the source of the information upon which it is based. I have, therefore, serious concerns about the adequacy of the IBEW's material in establishing irreparable harm on the basis of chill to other employees of K2. On the view I take of this matter, however, I need not determine that issue.

38. While his very brief period of employment meant that he never actually acted in the capacity, Cardno was to have been an inside organizer for the union. As such he would have been an important link between the IBEW and employees of K2. Counsel for K2 argues that Cardno was not the link: LeBlanc was the link. I agree, however, with counsel for IBEW that there is a difference in the kind of activity that an inside organizer can perform and the kind of activity that a paid staff organizer can perform: the former has greater access to the employees. Accordingly, in my view IBEW has established that it would suffer irreparable harm if Cardno was not reinstated.

39. In view of my conclusion on this point, it is not necessary for me to consider the IBEW's alternative argument that Cardno's reinstatement is necessary in order to achieve a significant labour relations objective. Nonetheless, it may be of some assistance to the community to have

the Board's preliminary views on counsel's argument, and accordingly I will address it. Counsel for IBEW argues that in any event the interim reinstatement of a trade union supporter is necessary in order to achieve a significant labour relations objective: respect for the rule of law in the workplace. He refers to *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019, as the basis for the policy position he states the Board should adopt with respect to the exercise of its interim relief powers. He argues that these powers give the Board the ability to inject itself into a labour relations situation at an early stage, assert the rule of law in the workplace, show the employees that there is some authority higher than the employer or the trade union and demonstrate that rights have meaning and can be vindicated through reinstatement and appropriate postings.

40. There is no question that the assertion of the rule of law in the workplace is a significant labour relations objective. The issue, however, is whether interim reinstatement is necessary to accomplish that objective. From the perspective of any employee who believes that he or she has been improperly discharged, it could be argued that the power to order interim reinstatement is necessary in order to demonstrate to that employee that rights have meaning. It is therefore of some significance that the Board has only been granted the discretion to grant interim reinstatement in the context of a union organizing drive. It is the need to redress the potential impact upon the other employees during this particularly delicate time which gives rise to the significant labour relations objective. Indeed, this is the policy approach which was recognized in *Tate Andale Canada Inc.*, even when the Board's interim reinstatement powers were not limited to organizing drives:

> 56. What is the "harm" potentially suffered by the union, the employees, and the process, if interim relief is not granted – that is, if the Board does not reinstate the grievors, or otherwise take steps to restore the labour relations *status quo* prevailing at the time of their discharge? Least significant, we think, is the potential wage loss to the aggrieved employees, which is fully recoverable (if they are successful) within a few weeks, and, in Sweetman's case, is moderated by the fact that he has already received some severance pay. More important, in our view, is the likely impact on other employees, who may have had an appetite for collective bargaining, but have just seen the union's two principal proponents summarily removed from the workplace in the midst of the organizing campaign. This is not a neutral event, and it would be totally unrealistic to expect employees to regard it that way.

41. In this case, for the reasons stated above, I have serious concerns about whether IBEW's material establish that what it characterizes as the suspension or lay-off and ultimately termination of Cardno has had a significant impact upon the other K2 employees in respect of the labour relations objectives and protections granted by the Act.

42. This leaves the issue of whether section 98(3) precludes the Board from ordering reinstatement. Counsel for IBEW argues that in determining this issue Board need only be satisfied that the material before the Board establishes an appearance that the employer's actions constitute an unfair labour practice. In reply he states that the question is whether on those materials the employer has discharged its onus to show that it did not engage in an unfair labour practice. Where, as in this case, there is a conflict in the declarations filed by the employer and the union, he states the Board may, if it chooses, hear evidence in order to make findings. If the

Board does not do so, however, then he states that the Board cannot say that the adverse employment consequence was unrelated to the exercise of rights under the Act. He argues that for the Board to do otherwise in circumstances of conflicting declarations, such as in this case, would require the Board to prefer the evidence set out in the declarations filed by the employer over those filed by the union. This, he states, the Board cannot do in the absence of hearing testimony and assessing the credibility of the witnesses.

43. I do not accept this argument. First, while section 96(5) places the onus of proof upon the responding employer for the purposes of the pending unfair labour practices application, section 98(4) expressly states that despite section 96(5), the onus of proof for the purposes of an application under section 98 for interim relief lies upon the applicant union. Second, the interpretation of section 98(3) offered by counsel for IBEW would render superfluous the determination under section 98(2)2. that the pending unfair labour practice application raises a serious issue to be determined. Third, issues of credibility may sometimes be disposed of on the basis of written declarations without cross examination, let alone viva voce evidence before the trier of fact: see *Bouchard v. OPSEU*, [2005] OLRB Rep. May/June 375, citing *Braithwaite Technology Consultants Inc. v. Blanketware Corp.* (2004) 72 O.R. (3d) 611. Fourth, section 98(3) directs the Board to determine whether the employer actions appear to be unrelated to the exercise of rights under the Act. As explained in *Patrolman*, in making this determination the Board is not making findings of fact, and therefore is not making assessments of credibility. If determinations of fact may be made exclusively on the basis of written declarations, appearances of fact may certainly be made on the basis of written declarations as augmented by questioning by the Board of counsel or declarants during a consultation.

44. Based on all the material before me it appears that the lay-off, suspension or discharge of Cardno was unrelated to the exercise of rights under the Act, and therefore section 98(3) precludes an order of reinstatement. In reaching this conclusion I have made a preliminary assessment of the likely evidence, based on all of the material before me, to determine how the explanation offered by the employer fits with the conduct alleged by the union and whether there appear to be any gaps in either the conduct complained of or the explanation. This was the nature of the exercise engaged in at this stage by the Board in *Patrolman* and in *UPS Supply Chain Solutions Inc.*, [2005] OLRB Rep. Sept./Oct. 904.

45. In this case, IBEW alleges that Cardno was suspended or laid off and then terminated because he was a union supporter. It is undisputed that Cardno only worked for K2 for two hours and then left the worksite on his own initiative to care for his sick daughter. K2's declarants appear to provide an explanation for the conduct that the union complains of: Cardno was not permitted to work the week of May 22 because he was a new employee and Kiernan's practice is to meet new employees on the worksite within the first one or two days that they work; Cardno was not permitted to return to work the week of May 29 because Kieran believed, based on a statement by a Ministry of Labour inspector, that this would result in it being in contravention of the TQAA. Further, it appears to me that the explanation offered by K2 is coherent and plausible in all of its details and fully responsive to the declarations filed by IBEW and questions posed by the Board.

46. On the other hand, the materials relied upon by IBEW are problematic in two respects. First, the change in Cardno's description of the circumstances surrounding the first statement appears self-serving. Cardno originally described the statement as being made by Kiernan during

an interview on May 12, 2006. After K2 filed its declarations indicating that both Kiernan and Lavigne would dispute that the statement was made during that interview, the IBEW indicated that in fact the statement was made on May 11, 2006, and further that it took place during a telephone conversation, which would limit the likelihood that K2 could produce a witness other than Kiernan who could dispute that the statement was made.

47. The second statement attributed to Kiernan by Cardno also appears to be problematic. It seems odd that Kiernan would say that because he had learned that Cardno was a member of the IBEW, he did not want him, or other IBEW members, working during the week that he was out of the country, but at the same time tell Cardno that he could return to work once Kiernan returned from vacation. If Kiernan did not want IBEW members working on his worksites, presumably it was because he was attempting to ensure that the IBEW would have insufficient numbers to obtain certification. Kiernan's return to the country would make no difference to this objective. Further, the second statement is inconsistent with the proposition that to Kiernan's knowledge K2 has employed at least five IBEW members for some time, if any weight at all is given to that aspect of Kiernan's declaration.

48. For the foregoing reasons, it appears to me that K2's actions were unrelated to the exercise by Cardno of rights under the Act. Whether this is in fact the case is a matter that will be determined in the pending unfair labour practices application after evidence is heard and findings of credibility are made. Section 98(3), however, provides that the Board shall not grant interim relief where it appears to the Board that an employer's actions were unrelated to the exercise of rights under the Act. This test has been met in this case. Accordingly, section 98(3) precludes the granting of interim relief.

49. In the result, for all of the foregoing reasons, the application for interim relief is dismissed.

4264-05-R; 0069-06-U The International Union of Painters and Allied Trades, Local Union 557, Applicant v. **L & L Painting and Decorating Ltd.**, Responding Party.

Certification Where Act Contravened – Construction Industry – Unfair Labour Practices – The certification and the ULP applications both indicated that the union might seek relief to be certified under section 11 of the Act – The employer made a motion on the first day of hearing to have the Board "strike" the reference to section 11 on both applications, arguing that once a trade union has made an application under section 128.1 it cannot "convert" the application to one brought pursuant to section 8 of the Act – The Board found it does have the power, pursuant to Rule 40.5, to permit an applicant to amend its application – The applicant must provide the Board with a reason to exercise its discretion – Whether the Board will permit a party to amend its application is a question of prejudice to other parties in the case and must be determined at the time the request is made – As the applicant was not seeking such an amendment at the time, the decision dealt only with whether an amendment to an application is available – Matter continues

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell, Juan Lopez* and *Franco Santeramo* for the applicant; *Chris Fiore* and *Leonid Raskin* for the responding party.

DECISION OF THE BOARD; June 27, 2006

1. This is an application for certification brought pursuant to the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, ch. 1, as amended (the "Act"). The application was filed on March 28, 2006, pursuant to the provisions of section 128.1 of the Act. On April 7, 2006 the applicant (the "Union") filed an application under section 96 seeking certain relief under the Act. In both the application for certification and the unfair labour practice complaint, the Union gave notice that it might seek relief to be certified pursuant to section 11(2) "if necessary".

2. On the first day of hearing, the Employer made a motion that, essentially, the Board "strike" the reference to the section 11 relief from both applications on the grounds that once a trade union has made an application under section 128.1, it may not "convert" or "switch" the application to one brought pursuant to the provisions of section 8 of the Act. It is unusual to bring a motion, or to entertain a motion, to declare in advance that certain relief is unavailable. However, the Employer asked the Board to do so in this case, as it asserts that settlement discussions can go no further without this clarification, and that, if its submission as to the availability of relief under section 11 is accepted, it would seek to revisit the issue of whether the section 96 complaint or the status disputes should be litigated first. I decided to hear the motion.

3. The background to this matter is as follows. The Union filed its application under section 128.1 asserting that there were 11 employees in the bargaining unit. The Employer filed a response asserting that there were 29 employees in the bargaining unit. If the employer is correct as to the identities and numbers of employees, the Union would have, as members, fewer than forty per cent of the employees in the bargaining unit. In *Southside Construction (London) Ltd.*, [2005] OLRB Rep. Sept./Oct. 854, the Board concluded that when an application is filed pursuant to section 128.1 and where the union turns out to have fewer than forty per cent of the employees in the bargaining unit as members, the application must be dismissed, and the union may not be certified under subsection 11(2)(c). Simply put, section 11 overrides section 8.1 and subsection 10(2), but it does not override section 128.1(7). In addition, the Board in that case concluded that it was not possible to apply for an application for certification under section 11 alone. Relief under section 11 is available only in the context of an application for certification brought pursuant to section 8 of the Act (or after a vote ordered under section 128.1 (14)). Therefore in this case, when the Union realized that there was a possibility that it would find itself in the position of being able to demonstrate support from fewer than forty per cent of the employees in the bargaining unit, it asserted a right, if necessary, to ask the Board to treat the application as having been made under section 8 of the Act.

4. The parties referred to four decisions of the Board dealing with this issue, and each of them has concluded that the Board does have the ability, in proper circumstances, to permit a trade union to do so. In *Southside Construction, supra*, the Board stated at paragraph 21:

> 21. ... It seems to me that unless the responding party is prejudiced by the amendment requested by the applicant, the Board ought to permit the

> applicant to amend its application. Rule 47 of the Board's Rules authorizes the Board to "allow a filing to be amended as the Board considers advisable". The responding party has not objected to the amendment sought by the applicant and has not submitted that it would be prejudiced if the amendment were permitted.

In *Monarch Development Corp. (c.o.b. Monarch Homes)* [2005] O.L.R.D. 4598, the Board concluded that the facts were identical and followed the same course of action that the Board did in *Southside Construction, supra.* In *Sarnia Paving Stone Ltd.* [2005] OLRB Rep. Nov./Dec. 1036, the Board declined to permit an amendment because the applicant had not identified any specific need or reason for asking for the amendment. The applicant stated that it was doing so merely as a "precautionary" measure in light of *Southside, supra.* In the absence of any reason to grant the request, the Board declined to do so. Finally, in *Marshall Homes Corp.* [2006] O.L.R.D. 1456, the Board permitted an amendment on the following terms at paragraph 9:

> 9. … Accordingly, there is a compelling reason for the Board to permit the applicant to make this amendment. Further, in circumstances where the applicant indicated in the application for certification that it would be seeking relief under section 11 of the Act and the responding parties were not in any position to assume that such relief would not be available in an application filed under section 128.1 the Board is satisfied that the responding party will not be prejudiced by this amendment. Finally, this amendment does not adversely affect or render unnecessary any of the steps that have been taken to date by either the Board or the responding parties.

5. I acknowledge the Employer's argument that two of these cases, *Monarch Development Corp., supra*, at paragraph 7, and *Sarnia Paving Stone Ltd., supra*, at paragraph 17, appeared to contemplate that such amendments might not be permitted by the Act. However, the Board nonetheless concluded that it did have the power to permit such an amendment in three of the cases, and in *Sarnia Paving Stone Ltd.* refused to do so for reasons that related to the nature of the request rather than any inability to do so.

6. Looking at the issue from first principles, I conclude that the Board does have the power to permit an applicant to amend its application to proceed under section 8, despite the fact that it proceeded initially under section 128.1. Section 128.1(1) provides:

> A trade union applying for certification as bargaining agent of the employees of an employer may elect to have its application dealt with under this section rather than under section 8.

The section is silent on whether the "election" can later be amended or reversed. I am unaware of any particular convention of legislative drafting that suggests that the word "elect" implies that in so doing, the party has taken an irrevocable step. The election is made in the application form itself. Rule 40.5 provides:

> **40.5** The Board may allow a filing to be amended as the Board considers advisable.

7. A trade union will be entitled to be certified if it demonstrates that it represents a majority of persons in a bargaining unit, or as permitted under section 11, if it persuades the Board that it would have been able to do so had the employer not violated the Act. Its entitlement to be certified rests on the basis of employee support. Section 8 and section 128.1 are simply different ways of demonstrating that employee support. There are advantages and disadvantages to either method of proceeding, although the Employer is correct when counsel states that most unions will find an application under section 128.1 more advantageous than an application under section 8 if they have the requisite levels of support. Thus, applications will be made under section 128.1, if that is at all possible. There is no fact situation in which a trade union would be able to apply under section 128.1, but would be unable to apply under section 8 (although the reverse is not true). If the Union is able to bring an application under section 128.1, then the option of an application under section 8 is always open to the trade union at the point of making the application. It is free to make either choice based on its perception of its own best interests. There is, therefore, no inherent reason why the union should be prevented from changing the option of which provision to elect when its perception of its best interests changes.

8. There may, however, be reasons to refuse to permit a trade union from doing so that arise from the context of any application.

9. The first question is obviously whether there is good reason to seek the amendment. The Board has treated a request to proceed under section 8 rather than under section 128.1 as a motion to amend the application under Rule 40.5. In my view, that is the correct method of analyzing the request. Generally, the amendment of a pleading requires the Board's consent. This means that the applicant must provide the Board with a reason to exercise its discretion.

10. In *Sarnia Paving, supra*, the Board was not given any particular reason. The union simply sought to make the application as a "precautionary step" in reaction to the *Southside Construction* case. In *Marshall Homes Corp., supra*, the Board concluded that the applicant had a "compelling" reason. Although the issue does not arise in this case, it does not seem to me that anything more than an easily identified interest on the part of the applicant is required on this particular point.

11. In examining whether to permit the Union to make the amendment, the Board has approached the issue essentially from the question of fairness to the responding party employer. All but *Sarnia Paving* dealt with the request on the basis of whether or not there was any prejudice to the employer and in *Sarnia Paving*, prejudice was not considered simply because it was unnecessary. The central question is whether some action has been taken in the file which causes material prejudice to the employer if an amendment is made. In *Monarch Development Corp., supra*, the Board said at paragraph 9:

> 9. As articulated in *Southside Construction (London) Limited, supra*, in the instant matter the parties have not yet exchanged submissions on the composition of the bargaining unit nor has the Board moved past dealing with issues which are common to applications made under both section 128.1 and section 8. The findings made by the Board in its decision dated October 5, 2005, would have been identical if this application had been dealt with under section 8 (rather than section 128.1) from the outset. The

> responding party is not being placed in any different position as a result of the Board now permitting the applicant to proceed under section 8 of the Act. Nor does the applicant's request to revoke its election under section 128.1 of the Act, at this stage of the proceedings and in the circumstances of this case, adversely affect or render unnecessary any of the steps which have been taken up to this point in time by either the Board or the responding party.

The decisions in *Southside Construction, supra* (at paragraph 21) and *Marshall Homes, supra* (at paragraph 9) analyze the request on the same basis.

12. There is also no impediment that arises from the Act's structure. Although the giving of notice under section 8.1 might be problematic when an amendment is sought well into the case, that does not, in and of itself create prejudice. No vote will have been conducted among the employees in the bargaining unit at that point, and if the applicant has less than 40% of the bargaining unit as its members, it will not be entitled to a vote under section 8 in any event. The application will be dismissed unless there is an order made under section 11.

13. Thus, I conclude that the Board does have the authority to permit a trade union to seek leave to amend its application pursuant to Rule 40.5 to proceed under section 8 rather than section 128.1, as initially pleaded. Whether the Board will permit a party to do so is primarily a question of prejudice to other parties in a case and must be determined at the time when the request is made.

14. In this case, the applicant is simply putting the responding party on notice that it may seek such an amendment. It proposes to do so to reduce any element of surprise that might give rise to an argument relating to prejudice should the applicant reach that point. It does not seek to do so at the present time. I will not determine in advance whether or under what circumstances the right to amend would continue to exist. Prejudice must be examined in the context of the case as it stands when the request is made.

15. This decision deals with whether an amendment is possible under the Act, and does not deal with the prejudice issue now or at some theoretical point in the future in this case at all. In addition, it should be noted that the availability of an amendment does not mean that success on the section 11 application is by any means assured. If, for example, the Union has not obtained membership evidence from 40% or less of the bargaining unit because it was unaware of one or more job sites containing a large portion of the bargaining unit, its chances of success are likely limited. That is a matter to be determined when the Board considers the request for relief under section 11 on the merits.

16. These matters will proceed, as scheduled, on August 2nd and 3rd, 2006, in the manner set out in the Board's decision of May 24, 2006.

0057-04-ES Karl M. Ellison, Applicant v. **National Fast Freight Inc.** and Director of Employment Standards, Responding Parties.

Discharge – Employment Standards – Reprisal – The Board reviewed an employment standards officer's finding that the claimant's termination did not result from a reprisal contrary to section 74 of the Act – The employer argued the claimant was terminated solely for circulating a petition to disband the dock committee – Circulating a petition was found not to be a protected activity under section 74 – The Board found however, that the petition was not the only reason for termination – The employee engaged in protected activity when he discussed hours of work and other rights under the Act with his coworkers – The employer was aware that the claimant was engaged in those discussions – The employer penalized the employee by way of termination – The employer intended to terminate because of those discussions – Remedial issues continue

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Karl M. Ellison* and *Shawn Batson for the applicant; Israel Balter* and *Mathew Dewar* for National Fast Freight Inc.*; Sidney Peters* for the Director of Employment Standards.

DECISION OF THE BOARD; June 19, 2006

1. This is an application for review under section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended (the "Act"). Karl Ellison seeks review of a refusal of an employment standards officer to issue an order finding that the termination of his employment by National Fast Freight was a reprisal contrary to section 74 of the Act.

2. Ellison was initially placed at National Fast Freight through a temporary staffing firm in May 2003. In June 2003 he was hired by National Fast Freight as a permanent employee. He was considered a probationary employee until September 2003. Shortly thereafter he was promoted to the position of junior loader. His employment was terminated on October 22, 2003.

3. National Fast Freight collects freight from clients at its facility and forwards it to locations across Canada. Ellison worked in the facility on the loading dock.

4. National Fast Freight's facility is not unionized. It has a "dock committee" which performs certain representational functions on behalf of the dock employees: it is a vehicle for communication between the employer and the dock employees; every three years it engages in negotiations with the employer of terms and conditions of employment for dock employees (the "contract"); and it assists employees who have concerns or grievances in their dealings with the employer. National Fast Freight asserts that the dock committee very important to its employment relations.

5. National Fast Freight's position is that it terminated Ellison after it was presented with a petition calling for the disbanding of the existing dock committee. It states that it believed that Ellison was central to the creation and circulation of the petition and for this reason, and this reason alone, terminated his employment.

6. Ellison challenges National Fast Freight's explanation for the termination of his employment. Further, he states that National Fast Freight has not proven that it had cause for the termination of his employment.

7. National Fast Freight called Ken Smale, its Human Resources Manager, Steve Farrar, its Terminal Manager, Roy Wathen, a member of the dock committee, and Josh Phelps, an employee on the dock at the time that Ellison was employed, as witnesses. Ellison testified himself and also called Shawn Batson, another employee on the dock at the time that Ellison was employed, as a witness.

Arguments

8. National Fast Freight argues that the issue before the Board is whether Ellison engaged in activities protected by the Act; whether the employer was aware that he had done so; and if so whether the decision of the employer to terminate Ellison was motivated in part by that knowledge. It denied that there was any evidence to support any of these three steps. It assailed Ellison's credibility and urged the Board not to accept his evidence with respect to the purported discussions with his co-workers. It noted that in any event, Ellison had conceded that he had no direct evidence that the employer was aware of any such discussions. And, it argued that there was clear evidence that Smale and Farrar became aware of the petition, believed Ellison was behind it and fired him as a result.

9. The Director of Employment Standards argues that there was some evidence that Ellison had engaged in protected activities under the Act, but no evidence that the employer was aware. Accordingly, it argues that there was no breach of the Act.

10. Ellison argues that he had no role with respect to the petition. In the alternative, he argues that the employer had no knowledge of his role with respect to the petition at the time that it discharged him. He argues that the petition had nothing to do with the reason he was terminated but was seized upon by the employer after the fact as the explanation. In the further alternative, he argues that the employer's response in terminating his employment was disproportionate to any role that he may have had with respect to the petition. He argues that the employer did not question him with respect to his role prior to terminating his employment; that the employer refused to participate in its own grievance procedure, as set out in its Employee Handbook; that notwithstanding the involvement of other employees, specifically Roy Wathen, the employer disciplined only him; and that three days after he was terminated allegedly because of his role with respect to the petition, the employer implemented the major recommendation of the petition.

11. Ellison argues that he was providing advice to other employees of National Fast Freight with respect to their rights under the Act and that the employer was aware of this. He argues that his actions with respect to informing other employees of their rights under the Act were common knowledge, and that therefore it is improbable that the employer had heard from other employees about his role with respect to the petition, but was unaware of his involvement in advising employees of their rights under the Act.

12. Finally, Ellison argues that the employer has a practice of breaching the Act with respect to hours of work and of threatening employees who attempted to enforce their rights under the Act, including himself.

13. On this basis, Ellison argues that his employment was terminated contrary to subsection 74(1)(a)(i), (ii) and (iv) of the Act. He argues that the employer has not discharged the burden imposed on it by subsection 74(2) of proving that his discharge was not contrary to section 74 of the Act.

Analysis

14. I begin by observing that I agree with counsel for the employer that Ellison was an unsatisfactory witness. He seemed unable to distinguish between his roles as an advocate on his own behalf and a witness with the result that he was unduly argumentative and refused to acknowledge obvious contradictions between his evidence at the hearing and prior statements which he had made. Ultimately, however, the issue is not whether I believe Ellison. The issue is whether the employer has discharged the burden of proof which is on it to show that it did not breach section 74 of the Act.

15. Sections 74(1)(a) and 74(2) of the Act provide as follows:

> 74. (1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,
>
> (a) because the employee,
>
> (i) asks the employer to comply with this Act and the regulations,
>
> (ii) makes inquiries about his or her rights under this Act,
>
> (iii) files a complaint with the Ministry under this Act,
>
> (iv) exercises or attempts to exercise a right under this Act,
>
> (v) gives information to an employment standards officer,
>
> (vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,
>
> (vii) participates in proceedings respecting a by-law or proposed by-law under section 4 of the *Retail Business Holidays Act*,

> (viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or
>
> (2) Subject to subsection 122 (4), in any proceeding under this Act, the burden of proof that an employer did not contravene a provision set out in this section lies upon the employer.

16. Section 74(1)(a) prohibits an employer from intimidating, dismissing or otherwise penalizing an employee, or threatening to do so because the employee has engaged in or intends to engage in one of the actions listed, which I will refer to as the protected activities. The focus of the provision is on the intention of the employer. The provision does not prohibit an employer from penalizing or threatening to penalize an employee when an employee has engaged in a protected activity; rather it prohibits an employer from penalizing or threatening to penalize an employee *because* the employee has engaged in a protected activity. Intention in turn requires knowledge or belief. An employer can only be said to have penalized or threatened to penalize because the employee has engaged in protected activity if the employer is aware or suspects that the employee has engaged in the protected activity. A breach of section 74(1)(a) will arise therefore when:

a. There is an employment relationship;

b. The employee has engaged in a protected activity;

c. The employer was aware or suspects that the employee engaged in the protected activity;

d. The employer penalized or threatened to penalize the employee; and

e. There is intention, i.e. that the penalty or threat of penalty by the employer was because the employee engaged in the protected activity.

The burden of proof that there is no contravention is upon the employer.

17. The fact that there is an employment relationship, that the employee has engaged in a protected activity and that the employer has penalized or threatened to penalize the employee can generally be proven by direct evidence: these are observable events to which witnesses can testify. Similarly the employer's knowledge will generally be presumed from direct evidence that the employer was told or observed the employee engaging in the protected activity. Evidence, however, is evidence. Thus, for example, in an appropriate case the employer's knowledge could be inferred from a consideration of other evidence.

18. Direct evidence of intention or motive, however, is not common. This is because any one who is aware that they are not permitted to undertake an action for a particular reason is unlikely to declare that they undertook the action for that reason. For similar reasons declarations by the person that they did not undertake the action for a prohibited reason are suspect as self serving. Motive, as a result, almost always falls to be determined on the basis of inference. Thus,

in a case alleging a breach of section 74 of the Act, the question is whether the evidence on a balance of probabilities supports the inference that the employer's action was not motivated in whole or in part by the fact that the employee undertook one of the protected activities. Credible evidence that an employer undertook the action for a non-prohibited reason will tend to defeat the inference, since it provides an explanation for the employer's actions. At the same time, the existence of a non-prohibited reason for taking an action does not necessarily mean that the action was not also motivated in part by a prohibited reason, and hence contrary to section 74 of the Act. Where the action taken by the employer appears disproportionate to the reason offered as an explanation, or otherwise appears implausible in light of the other evidence, the Board may infer that the employer's action was improperly tainted by a prohibited reason.

19. In this case, there is no dispute that the employment relationship existed between Ellison and National Fast Freight and that National Fast Freight terminated that relationship. There is a dispute about: whether Ellison engaged in protected activities; if so whether the employer was aware that he had engaged in those activities; and if so whether the employer terminated his employment in whole or in part because he engaged in protected activities.

20. Ellison was assertive about his rights, real or perceived, in his dealings with his employer. Having observed him in the hearing, I have no doubt that he is an argumentative individual.

21. While still a probationary employee, on a Saturday at the end of August 2003, Ellison left work without authorization, asserting that he had already worked 48 hours for the week. Smale was advised about this conduct. He reviewed Ellison's time cards for the week and determined that, after deduction of time for lunch, they showed that Ellison had worked only 47 hours in the week. He directed the General Foreman, Dennis Tremblett, to discuss the matter with Ellison. Smale's concerns were the potential health and safety issues raised by an employee simply leaving the workplace without telling anyone and the fact that, in his view, the contract of employment in any event authorized work in excess of 48 hours per week. Ellison testified that Tremblett appeared ready to discipline him for this infraction however, after Ellison argued in his own defence, Tremblett "tore-up" the letter.

22. Shortly after he became a permanent employee, Ellison had been asked to perform the duties of a junior loader, a higher rated position. He refused to do so unless he received the rate of pay associated with the position. Smale responded by promoting him to the position of junior loader and paying him the wage rate associated with the position retroactively to September 2, 2003.

23. In the meantime, Ellison testified that he and other dock employees talked about hours of work, excessive overtime, health and safety issues, the Employee Handbook, statutory holiday pay and other items. He stated that during these discussions he contributed his limited knowledge of the Act, and of the Employee Handbook. Because of confusion about the nature of their rights under the Act, he ordered a copy of the Act on August 28, 2003. He testified that he showed the Act to several employees, including Batson, and at least two members of the dock committee.

24. Batson worked at National Fast Freight at the same time as Ellison and took breaks with him. He testified that many times during the breaks he, Ellison and other employees discussed the Handbook, statutory holidays, overtime and hours of work. During these

discussions Ellison made reference to sections of the Act, and in fact showed employees the Act. He also testified that "Keith", a supervisor was present during one or more of the discussions with respect to employment problems that existed at National Fast Freight.

25. Wathen testified that there had been discussions about long hours of work among employees on the dock. He said that the concerns of employees were addressed when Smale posted a memo dated October 8, 2003, described further below. He agreed that on at least one occasion Ellison had been a participant in a discussion about hours of work and excessive overtime. He did not recall any specific reference in these discussions to the Act.

26. Phelps, who at the time of his testimony held the position of dock foreman, denied any recollection of Ellison ever indicating that he was seeking to enforce rights under the Act.

27. Based on the corroboration of Ellison's evidence by Batson and Wathen, I find that Ellison did discuss rights under the Act with his fellow employees. Ellison conceded that he had no direct evidence that any supervisor was aware of these discussions, but he also stated that: Gurvinder Gill, a supervisor, observed him having a discussion with a dock representative with respect to issues in the Employee Handbook and issues under the Act; that Tremblett, Farrar, Gill and Oumkar, another supervisor, were around during other discussions about the Handbook and the Act; and that he had discussions with Gill and Oumkar on more than one occasion with respect to hours of work and overtime.

28. Ellison testified that in the mean time he and his co-workers also had discussions about the composition of the dock committee. They felt that the members of the dock committee should be elected, not appointed, and that lead hands should not be members of the dock committee. Notwithstanding his argument that he had no role with respect to the petition, Ellison admitted in his evidence that he drafted the petition. While Wathen played a role in circulating the petition, Wathen and Phelps testified that Ellison also played a role in its circulation. Ellison denied that he had a role in the circulation of the petition but admitted that he presented the petition to Phelps.

29. The text of the petition reads as follows:

> Petition to Human Resources
> Attention: Mr. Ken Smale
>
> We, the employees of National Fast Freight petition the company to make the following changes to the current process of establishing a dock committee.
>
> (1) The current "dock committee" be dissolved immediately.
>
> (2) A new "dock committee" is [sic] be elected by the employees using the process of secret ballots.
>
> (3) One nominated dock representative shall be elected from each of the current work shifts.

> (4) Nominations are to be posted with the Human Resources Department.
>
> (5) Only regular-full time dock workers may submit letters of acceptance for nominations and or be elected to the "dock committee".
>
> (6) Only regular – full time dock workers may cast a vote.
>
> (7) No "lead hand" or other levels of management may serve on the "dock committee" as representatives of the dock workers.
>
> (8) Where only one letter of acceptance has been submitted by a specific work shift. That person will be considered as elected by acclamation.
>
> (9) Where no letters of acceptance have been submitted by a specific work shift. Said shift will not have an elected dock representative but, said shift will be represented by other elected dock representatives. Until such time as a by-election can provide an elected representative.
>
> We, the undersigned employees acknowledge the content of this petition and support the petition by placing our information on the following pages.

30. While initially Ellison appeared to take the position that the circulation of the petition itself was a protected activity under the Act, he did not advance this position in final argument. In any event, I find that circulation of the petition was not a protected activity. There is nothing about the content of the petition which in any way engages the Act, and the Act does not provide a right to circulate petitions per se.

31. Ellison's is the first signature on the petition. His signature is dated October 6, 2003. Wathen's signature, also dated October 6, 2003, is next. There are a total of 21 signatures on the petition (there were 30 to 35 dock employees at the time in question). The last two signatures are dated October 18, 2003. All the rest are dated between October 6 and October 10, 2003.

32. Wathen testified that during the period that the petition was being circulated he went to Tremblett and showed it to him. He testified that Tremblett did not appear angry and did not in any manner suggest that he should stop circulating the petition.

33. Smale testified that during the course of his duties he makes it a point to perform "walk-abouts" along the dock at least daily to increase his availability to dock employees. During the course of these walk-abouts certain employees approached him about the fact that a petition was being circulated among dock employees. The petition, he was told, called for the contract to be torn up and for the dock committee to be dissolved. They told him that they did not like the petition, that some of the employees who had signed the petition felt pressured and coerced, and wanted their names removed. He was told that Ellison was behind the petition. In cross examination, Smale testified that when he first learned of the petition he "probably just smiled and shrugged [his] shoulders" and that he was not angry or upset. He also testified that he was

not angry or upset when he became aware of Ellison's role with respect to the petition. As time went on, however, he could observe that there was increasing discord among the dock employees. He only became concerned when he became aware of the impact the petition was having on the dock employees, and its purpose which he described as being to "overthrow the dock committee", the "heart of our structure".

34. Smale testified that during his walk-abouts he also heard concerns by employees about hours of work. While Ellison's name had come up in relation to the petition, he denied that it ever came up in connection with these concerns. He responded to the concerns by posting a memo dated October 8, 2003, which reviewed the requirements of the Act in relation to hours of work, directed interested employees to the Ministry of Labour website for further information and set out National Fast Freight's view that by signing the initial letter of employment employees had agreed to work in excess of 48 hours per week.

35. Farrar testified that on October 22, 2003, Phelps brought the petition to him. Phelps told Farrar that Ellison had been circulating the petition and that Ellison wanted to dissolve the dock committee and tear up the contract. Phelps identified only Ellison as having a role in the creation and circulation of the petition. Phelps' evidence corroborated that of Farrar on these points.

36. Farrar testified that he was furious: in his view Ellison, who had been employed by the company for only four months, was attempting to undermine an important aspect of the business. Farrar took the petition to Smale. Farrar testified that Smale was not surprised, having heard rumblings that Ellison "was out there stirring up trouble".

37. Farrar and Smale jointly made the decision to terminate Ellison's employment. Smale prepared a letter of termination for the signature of Dennis Tremblett, the General Foreman. It was provided to Ellison that day. The reasons for termination set out in the letter are generic in nature: there is no specific reference to the petition or to Ellison pressuring or coercing other employees. Ellison was provided with one week's pay in lieu of notice. Smale and Farrar testified that the sole reason Ellison was terminated related to his role with the petition. Smale testified that given the concerns expressed to him by employees about Ellison's actions in relation to the petition, they acted on their reasonable belief that Ellison was "stirring up trouble".

38. Farrar and Smale did not meet with Ellison prior to terminating his employment. Ellison then attempted to make use of a "grievance procedure" outlined in the Employee Handbook. Phelps, as a dock representative met with Farrar and Smale to attempt to set up a meeting with Ellison contemplated by the Employee Handbook. They refused to meet. Phelps testified that in declining to meet with Ellison they referred to the fact that he was "stirring the pot". Smale testified that while this process was utilized by the company and had, on at least one occasion resulted in the reinstatement of an employee, they felt that there was no purpose to such a meeting as "given the issues in [Ellison's] case, the circumstances were not going to be reviewed, and we were not going to go through the charade".

39. I find that the evidence establishes that at the time that Farrar and Smale made the decision to terminate Ellison's employment, they believed that Ellison had a central, if not exclusive, role in the creation and the circulation of the petition. The issue remains whether Ellison was terminated solely for this reason.

40. Is the employer's action of discharging Ellison for this reason disproportionate or otherwise implausible in light of all of the other evidence? In my view it is, for the following reasons.

41. While Smale's evidence was that he became concerned when he received reports that Ellison was coercing other employees into signing the petition, there was no suggestion that he did anything at all about those reports until Farrar met with him after the petition was presented.

42. Notwithstanding Phelps' statement to Farrar that Ellison wanted to dissolve the dock committee and tear up the contract, the petition states nothing of the sort. Rather it calls for the dissolution of the existing dock committee and the election of another by secret ballot. This statement, in and of itself, would not appear to have been particularly problematic within the context of this workplace. Wathen's evidence was that after he showed Tremblett the petition, Tremblett did not appear angry and did not in any manner suggest that he should stop circulating the petition. Smale's evidence was that he himself was not initially concerned when he learned of the circulation of the petition. Further, the employer held elections by secret ballot within a week of Ellison's discharge. Whether this was, or was not the normal practice with respect to such elections is not critical. If it was the employer's normal practice, then the petition's request that such elections be held was clearly innocuous. If it was not, then the fact that the employer held such an election is inconsistent with the employer's explanation that Ellison's request that such elections be held was sufficient to cause it to terminate his employment.

43. The employer conducted no investigation to determine whether any other employee was involved with the petition, and did not meet with Ellison prior to making the decision to terminate him. If merely being involved in the creation and circulation of the petition was sufficient to justify termination of an employee, albeit a very junior employee, the employer would presumably have wanted to know who else was involved. And yet the employer made no further inquiries.

44. In particular, Tremblett, who was the signatory to Ellison's letter of discharge, was aware of Wathen's role in circulating the petition. Yet, having made the decision to terminate Ellison because of his role in relation to the petition, the employer did not even question Wathen further about his role, let alone take any disciplinary action against him.

45. Farrar testified that when he received the petition from Phelps he became furious. Notwithstanding the fact that at the same time Phelps told him that Ellison wanted to tear up the contract, Farrar's response appears disproportionate, given the contents of the petition itself and the fact that Farrar had also testified that he had received no prior complaints about Ellison.

46. Ellison gave evidence that four supervisors, Tremblett, Farrar, Gill and Oumkar, were around during other discussions about the Handbook, the Act, or hours of work and overtime. Batson testified that "Keith" another supervisor, was present during one or more discussions of employment problems at National Fast Freight. Only Farrar was called as a witness by the employer. The failure by the employer to call the other supervisors named invites the inference that their evidence would not have supported the employer: that is that they would have admitted to being present for such discussions and further of having advised Smale or Farrar. Even discounting Ellison's evidence, leaves the failure to call "Keith" unexplained. Further, quite apart

from Ellison's evidence, the failure of Tremblett to testify is problematic given the evidence of his prior knowledge of the petition and of the fact that he was the signatory to the discharge letter.

47. Smale's memo with respect to hours of work was dated October 8, 2003, while most of the signatures on the petition were dated between October 6 and October 10, 2003. This means that discussions with respect to both issues were taking place among dock employees more or less contemporaneously. I am satisfied that Ellison played an active role with respect to both issues. Smale's evidence that he was aware of both discussions, but only aware of Ellison's involvement with respect to the petition is simply not plausible. It is difficult to believe that the same employees who told Smale about Ellison's involvement with the petition would not also have told him of Ellison's involvement in the discussions with respect to hours of work. Equally, given that Smale considered the hours of work issue to be significant enough to respond to by means of memo, it is difficult to believe that he would not have inquired as to who was involved in discussions about that issue.

48. On balance, I am satisfied that Farrar and Smale terminated Ellison's employment for "stirring up trouble". I am not satisfied, however, that in making that decision they were unaware of Ellison's discussions with other employees about hours of work and other rights under the Act, nor am I satisfied that those discussions were not part of the "trouble" which caused the employer to take the ultimate step of termination.

49. Accordingly, I find that the termination of Ellison's employment was contrary to section 74 of the Act.

50. At the outset of the hearing, all parties requested that the issue of remedy be addressed separately if necessary. This matter is referred to the Registrar to schedule a further hearing for this purpose. The Manager of Field Services is requested to reassign a Labour Relations Officer to this matter to attempt to assist the parties to reach a settlement with respect to the appropriate remedy prior to the hearing.

4276-04-R Michael McLellan, Applicant v. Ontario Public Service Employees Union, Local 278, Responding Party v. **Ontario Lottery and Gaming Corporation c.o.b. as The Slots at Fort Erie Racetrack**, Intervenor.

Bargaining Rights – Employer Initiation – Termination – In this application for termination of bargaining rights, the union alleged that the employer had involved itself in the campaign, contrary to s. 63(16) of the Act – The union contended that: (1) the employer had knowledge of the application before it was delivered; (2) an employee in the human resources department made telephone calls to bargaining unit members to encourage their participation in the representation vote; and (3) the employer provided information to the applicant to enable him to send campaign literature to bargaining unit members – During the hearing, the employer conceded the first and third allegations, but submitted that neither constituted a violation of the Act – The Board considered all three allegations, holding that the employer's prior knowledge of the application was obtained innocently and the evidence of the employer's provision of employee information to the applicant was

circumstantial and not compelling – With respect to the employee's phone calls to bargaining unit members, the Board could not conclude there was any evidence of improper comments – The union's objections were dismissed – Following the counting of the ballots, the termination application was successful

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Mike McLellan* and *Audrey Shisler* appearing for the applicant; *Tim Hannigan, Fran Borsellino, Jason Sliepenbeck* and *Karen McKay* appearing for the responding party; *Simon Mortimer, John Bruce, Gregory Power* and *Valerie Jamieson* appearing for the intervenor.

DECISION OF THE BOARD: May 4, 2006

1. This is an application for termination of bargaining rights under subsection 63(2) of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended (the "Act").

2. The only issues in dispute relate to the responding party's ("OPSEU" or "the union") allegations under subsection 63(16) of the Act. Subsection 63(16) states:

> **63.** (16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

3. OPSEU's allegations fell into three areas. First, it asserted that the intervenor (or "the employer") knew about the application before it was delivered. The union contended that Joseph Claus, a manager at the Ontario Lottery and Gaming Corporation's Windsor Racetrack Slots location, made statements to a local union representative on March 3, 2005 indicating his awareness of a pending application for termination of bargaining rights at the Fort Erie Racetrack Slots site. From these statements, the union inferred improper employer involvement in the application.

4. Secondly, OPSEU contended that the intervenor actively encouraged bargaining unit members to take the opportunity to cast ballots in the representation vote. The union alleged that Judy Richardson, a Human Resources Assistant, made telephone calls to all bargaining unit employees in an attempt to encourage them to participate in the representation vote.

5. Thirdly, OPSEU alleged that the employer provided information to the applicant to enable him to send campaign propaganda to bargaining unit employees, including Karen McKay.

6. At the commencement of the hearing on November 15, 2005, the intervenor (or "the employer") conceded that Mr. Claus made the statements attributed to him by OPSEU, and conceded further that Ms. Richardson made the phone calls and reached a good number of the bargaining unit employees with her exhortation to vote. The employer submitted that neither concession constituted a subsection 63(16) violation. The employer denied any involvement in the provision of employee information to the applicant.

7. In the course of the first day of hearing, I made a procedural ruling, which limited the scope of the evidence. I ruled orally that, given the employer's two concessions, the only evidence I was prepared to hear was that with respect to OPSEU's allegation that the intervenor provided employee information to the applicant. The Board proceeded to hear that evidence in its entirety, as well as the final arguments of the parties, on the understanding that the union was intent on seeking reconsideration of the Board's ruling.

8. The union filed its request for reconsideration with the Board on November 21, 2005. In my interim decision of December 15, 2005, I reconsidered my previous oral ruling, and decided that the union was entitled to examine Mr. Claus, and adduce any other evidence that might shed light on the circumstances by which the employer came to know of the application before its delivery. Consequently, the hearing continued on February 15, 2006 and April 11, 2006. On April 11, 2006, after the last witness was called, I heard the parties' final submissions.

9. This decision deals with all the evidence and all the submissions of the parties over the course of the entire hearing.

The employer's foreknowledge of the application

10. The bargaining unit at the Fort Erie site consists solely of security officers, including the applicant, Michael McLellan. They report through their respective security supervisors to Thomas Kavanaugh, the Security Manager.

11. Mr. Claus is Mr. Kavanaugh's counterpart at the employer's Windsor site, the Windsor Racetrack Slots. He too has overall responsibility for the supervision of security officers and security supervisors there.

12. Mr. Claus and Mr. Kavanaugh knew each other previously when they worked in different capacities in a security department in Niagara Falls. They have had occasional contact in their current positions as Security Managers.

13. Mr. Claus learned of the application at the Fort Erie site before it was filed and delivered in early March 2005, through his sister-in-law, who worked as a Main Bank Cashier for the employer at Fort Erie. She and Mr. Claus communicated regularly, and in the course of one telephone conversation on March 1 or 2, 2005 she volunteered that the security officers at her workplace were on the verge of making a decertification application. Mr. Claus could not remember whether he told anyone from his workplace about this information, but he was certain he did not inform anyone at corporate head office (i.e. the Ontario Lottery & Gaming Corporation or "OLGC"). He further recalled that he informed Mr. Kavanaugh, by e-mail at 8:29 a.m. on March 3, 2005.

14. The e-mail exchange between Mr. Claus and Mr. Kavanaugh was produced in the course of Mr. Claus's testimony, and referred to as well when Mr. Kavanaugh testified. Mr. Claus wrote the following:

Joseph Claus To: Tom Kavanaugh/OLC@OLC

03/03/05 08:29 AM cc:
Subject: Re: Matt Sepkowsky

What are you doing in so early?

How was your ICM roll-out?

I also heard that some of your officers have a de-cert campaign.

You go girl!!!

Joe Claus, Security Manager
Slots at Windsor Raceway
Phone: 519-250-3607
Fax: 519-250-3633

15. Mr. Kavanaugh responded at 8:44 as follows:

From: Tom Kavanaugh/OLC

Recipients: Joseph Claus/OLC@OLC

Subject: Re: Matt Sepkowsky

Date: 03/03/05 08:44:57 AM

Showcase 2005 today – big marketing day
ICM rollout was fine – still a few kinks to roll out but okay
decert application is being filed as we speak so got the fingers crossed – will keep you in the loop

catch ya' later

16. Mr. Kavanaugh testified that between the time he arrived at the office on March 3, 2005 at approximately 8:15 a.m., and the time he responded to Mr. Claus at 8:44 a.m., the applicant, Mr. McLellan dropped by his office and told him that he had just filed a decertification application. Although Mr. Kavanaugh had heard some indirect rumours about the possibility of such an application, this was the first and only time that he was informed directly. Mr. Kavanaugh was at first somewhat doubtful, but he determined that Mr. McLellan was being sincere. Mr. McLellan left Mr. Kavanaugh's office immediately after providing his Manager with his news. Having accepted that Mr. McLellan was telling him the truth, Mr. Kavanaugh hoped that the application would succeed. He may have relayed Mr. McLellan's revelation to a Human Resources representative in the workplace, but he could not recall that he contacted any other persons and he specifically recalled that he did not speak to anyone at OLGC. At no time did Mr. Kavanaugh communicate with any bargaining unit employees about the application or about a decertification campaign, other than the one conversation with Mr. McLellan on March 3, 2005.

17. Mr. Kavanaugh could not recall if he passed on any further information about the application to Mr. Claus. Mr. Claus did recall, however, that Mr. Kavanaugh informed him of the close results of the representation vote.

Allegation of employer involvement in the dissemination of propaganda

18. Karen McKay is a security officer at the Fort Erie site. She received a two-page anti-union newsletter through the mail, addressed to her residence in Stevensville. Some, but not all, of her co-workers received the same newsletter. According to Ms. McKay, the envelope she received (but no longer had in her possession when she testified) contained her name, street address, postal code and postal box number. She does not have mail delivery service; she goes to the local Post Office to pick up her mail in a locked box for which she has a key. Sometimes she receives mail addressed to her street address, but without reference to her post office box number.

19. Ms. McKay's address and phone number are not published in the telephone directory, principally because her boyfriend is an employee of the Ministry of Transportation of Ontario ("MTO"), and, according to Ms. McKay, the MTO has a rule against the publication of its employees' names and addresses. Ms. McKay testified that, to her knowledge, no one at her workplace other than the employer knows her address, including the postal box number. No one from the Fort Erie site has ever been to her house. Her neighbours include Larry and Tracy Sills, who work respectively as a slot attendant and a slot technician at the Fort Erie site. Ms. McKay does not socialize with the Sills, and has never spoken to them outside of the workplace. She has never provided the Sills with her postal box number.

20. Audrey Schisler, a security officer at the Fort Erie site, assisted the applicant, Mr. McLellan with the application. She prepared and mailed the newsletters to everyone she knew and for whom she had addresses. Mr. McLellan provided her with some of the addresses. She researched others from the phone book, and obtained some addresses by asking individuals who she thought might volunteer the information. She insisted in her testimony that she did not make any such inquiries of management or Human Resources, and did not receive any addresses or telephone numbers from those sources.

21. Ms. Schisler recalled that she obtained Ms. McKay's address from the Sills. She did not think the Sills gave her Ms. McKay's postal box number, and though she could recall addressing the envelope to Ms. McKay at her street address in Stevensville, she could not recall if she included a postal box number.

22. Mr. McLellan also testified. He said Ms. McKay gave him her address, telephone number and e-mail address because her boyfriend occasionally repaired Mr. McLellan's car at their residence in Stevensville. The boyfriend would pick up Mr. McLellan's vehicle at the Fort Erie work site, take it to Stevensville, perform the repairs there, and return the vehicle to Fort Erie. Mr. McLellan said Ms. McKay gave him her address because that is where his car was being repaired. He conceded that the address did not include a postal box number, as that would have been irrelevant to him. I note here that Mr. McLellan testified before Ms. McKay, but that no party subsequently questioned Ms. McKay concerning whether or not she disclosed her address, phone number and e-mail address to the applicant.

23. Mr. McLellan corroborated Ms. Schisler's evidence that she was the sole creative force behind the newsletter (he did not approve it or even see a copy before it was mailed, and did not appear to be certain what message it contained), and that she alone mailed it out. He provided her some addresses, which he testified he obtained through Internet research. He insisted no one provided him this kind of information.

24. Mr. McLellan did not claim to have provided Ms. McKay's address to Ms. Schisler. He did say that, to the best of his knowledge, the newsletters were sent only to known supporters of the application, or to people who were undecided about their support. As far as he knew, the newsletters were not sent to, and not intended for, known union supporters. He considered Ms. McKay to be a union supporter.

25. Valerie Jamieson, the Human Resources Manager at the Fort Erie site, testified in the main about how employee personal information is obtained, recorded and secured. Generally, the Human Resources department is the custodian of such information, including employee addresses and telephone numbers. Employee data is generally recorded on various forms and documents which are secured in a locked room in the Human Resources department. Most of the data from the documents are inputted onto a human resources computer system (PeopleSoft) with links to the payroll system. However, the computerized employee address data is kept on a hard drive accessible only to Ms. Jamieson and four other persons in the department who report to her. Human Resources has the sole authority to make and produce written reports from the computer system. The only hard copy report generated by Human Resources containing employee addresses is a union dues report which is sent regularly to OPSEU. Otherwise, employee address information is not shared by Human Resources with anyone else, except with the consent of the owner of the information. The only way a person other than a Human Resources employee could gain access to the employee address information kept by the Human Resources department is through a member of that department, and as Ms. Jamieson testified, such an unauthorized disclosure would be contrary to policy.

26. Ms. Jamieson testified that she did not provide access to employee information maintained in her department to any individual in connection with the application, and was not aware of anyone else in Human Resources who might have done so.

The telephone calls from Human Resources to bargaining unit employees

27. As I have indicated, the employer did not dispute that Human Resources representative, Judy Richardson, telephoned a number of bargaining unit employees and encouraged them to cast a ballot in the upcoming representation vote.

Decision

28. With respect to the employer's foreknowledge of the application, I am persuaded the employer obtained the information about the pending application innocently. Mr. Claus, in Windsor, learned of a decertification campaign through his sister-in-law in Fort Erie, and upon receiving this information, he disclosed it to his colleague, Mr. Kavanaugh. Just before receiving that disclosure from Mr. Claus, Mr. Kavanaugh himself learned of the filing of the application through Mr. McLellan. There was no evidence to suggest that these communications signalled

employer involvement in, or initiation of, the application. The only evidence is that the employer became privy to the filing of the application through the workplace grapevine.

29. The circumstances respecting the mailing to Ms. McKay are somewhat more complex. The uncontradicted evidence of Mr. McLellan and Ms. Schisler is that they alone were involved in sourcing the employee addresses. They said they obtained their information from the telephone book, the Internet, and voluntary disclosure by third persons, none of whom were in the management structure at Fort Erie. Ms. McKay said that, to the best of her knowledge, no one but the employer knew her address. But Mr. McLellan's testimony was that she provided just that information to him, and no one asked Ms. McKay about that particular alleged disclosure in the course of her examination. There is, therefore, no reason to disbelieve Mr. McLellan. So, I accept and find that Ms. McKay did disclose her personal information to Mr. McLellan,. This calls into doubt her evidence that, as far as she knew, she had not told anyone in the workplace her address. I am not suggesting she misled the Board. She might have disputed Mr. McLellan's version had it been put to her. But as it is, I can only conclude that she is mistaken, and may be mistaken generally about the extent to which she made disclosures of a personal nature to others in the workplace.

30. Without the envelope containing the newsletter to Ms. McKay, it is difficult to be categorical about the source of the postal box number. I accept Ms. McKay's evidence that the envelope contained that piece of information. There was no contradictory evidence on this point. However, I am not prepared to accept her assertion that it was not possible the Post Office itself, or someone else, inserted the postal box number on the envelope after it was mailed. Ms. McKay offered no reasonable basis for such a claim, and she did not say whether the address on the envelope was typed or handwritten. Without the physical evidence, I am unable to draw any conclusion as to who inserted Ms. McKay's postal box number on the mailing sent to her.

31. The other problem for the union's case is that employee address information was not within the exclusive domain of the employer. The union dues report contained that information and was shared with the union. There was no evidence led as to who might have access to the reports once they were in the union's possession.

32. In conclusion, the circumstantial evidence of the employer's involvement in the provision of employee information to the applicant in furtherance of the application is not particularly compelling or cohesive. I am not prepared to draw an inference of misconduct based upon the evidence before me.

33. I turn finally to the telephone calls by Ms. Richardson. In *Camp Canada Ltd.*, [2003] OLRB Rep. September/October 744, which involved an application for certification, the employer arranged for its supervisors to call all the employees who were off work to urge them to come to the workplace and vote. One employee was granted time off to drive a co-worker, who was off due to an injury, to the vote. Prior to the day of the vote, the employer put several documents in the employees' pay envelopes, one of which encouraged the employees - at considerable length - to vote, and also indicated the employer's preference for a non-union workplace. The Board found nothing unlawful in those activities. Regarding the telephone calls, the Board noted that an employer takes a risk that things will be said which exceed the bounds of permissible speech, but concluded that there was no evidence of improper comments.

34. The facts in the case before me are, frankly, considerably more innocuous than those confronted by the Board in the *Camp Canada* matter. In the case before me, the employer simply called employees and encouraged them to vote. It did not encourage them to vote one way or another. It did not compound those communications with written documents asserting the importance of voting and indicating the employer's preference for a non-union result. Counsel for the union submitted that Ms. Richardson's phone calls demonstrated the interest of the employer in the application. In my view, an employer is entitled to take an interest in a matter that will affect its collective bargaining and recognition obligations under the Act. In this case, the employer appears to have taken an interest merely in full participation in the workplace democratic process. There is nothing with which to find fault in Ms. Richardson's phone calls.

35. Does the totality of the evidence concerning Mr. Claus and Mr. Kavanaugh, the mailing to Ms. McKay, and the Richardson telephone calls complete a picture of "significant or influential employer involvement giving rise to the termination application" (*Bytown Electrical Services Ltd.*, [1996] OLRB Rep. September/October 721, at paragraph 108)? I acknowledge that, as the Board noted in *Tenaquip Ltd.*, [1997] OLRB Rep. July/August 742, because trade unions will not typically be in a position to establish affirmatively and directly an employer's involvement in an application for termination, it may be sufficient to adduce circumstantial evidence which then leads to an inference of misconduct. In this matter, the only circumstantial evidence is that relating to the insertion of a postal box number on an envelope (Mr. Claus's and Mr. Kavanaugh's foreknowledge of the application was fully explained, and there was nothing circumstantial about Ms. Richardson's phone call.) I have already stated that I do not find that evidence to be compelling. So, I am left to conclude that the union has failed to demonstrate, even inferentially, that the employer was involved in the application in any significant or influential manner. I find no violation pursuant to subsection 63(16) of the Act.

36. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in opposition to the responding party.

37. The Board declares that the responding party no longer represents the employees of Ontario Lottery and Gaming Corporation c.o.b. as The Slots at Fort Erie Racetrack for whom it has heretofore been the bargaining agent.

38. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

39. The employer is directed to post copies of this decision immediately, in a conspicuous location(s) where it is likely to come to the attention of the employees affected by this application. These copies must remain posted for a period of 30 days.

3798-05-R; 3958-05-U Construction Workers Local 52, affiliated with the Christian Labour Association of Canada, Applicant v. **Pre-Eng Contracting Ltd. and Constaff Construction Ltd.**, Responding Parties v. Labourers' International Union of North America, Local 506, and Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America, Intervenors.

Certification – Construction Industry – Membership Evidence – Practice and Procedure – The Board decided after examining the membership evidence that the dates on which the cards were signed should be disclosed for the following reasons: the information was arguably relevant; the pattern of dates on the cards was not likely to distort any party's presentation of its case; and, given that the Board might draw some conclusions from having looked at the dates, natural justice required that the parties be entitled to the information in order to make submissions – Finally, the Board refused to disclose the total number of cards in the application, since such disclosure would open the door to changes of position based on the perception of the likely strength of the union rather than a desire to identify which employees are actually in the appropriate bargaining unit

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Jack B. Siegel, Johnathan Van Huizen* and *Paul Graham* for CLAC; *Daniel Leone* and *John Gregoris* for Pre-Eng Contracting Ltd.; *Elizabeth Mitchell, Elio Toppan, Carlo DiBlasion* and *Sergio Fera* for Labourers, Local 506; *David Watson* and *Phyllis Gallimore* for the Carpenters Union.

DECISION OF THE BOARD: June 14, 2006

1. This is an application for certification brought pursuant to the construction industry provisions, and in particular section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995 ch. 1 (the "Act"). The applicant is the Construction Workers Local 52, affiliated with the Christian Labour Association of Canada ("CLAC"). The two intervenors, the Labourers International Union of North America, Local 506 ("the Labourers") and The Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (the "Carpenters") have also filed application for certification for their respective craft units, but after the date of CLAC's application. Their position in this case is that CLAC received employer support and that its application should be dismissed for that reason.

2. At the commencement of this proceeding, the Labourers asked that the dates on which the membership applications were filed by CLAC in this application be revealed to the parties. After some hesitation, the Labourers agreed that if the Board were disposed to do so, the dates of the membership applications it had filed should also be revealed. The Carpenters joined with the Labourers in this request.

3. CLAC opposed this request on two grounds. The identity of persons who have joined a union is information that the Board is directed by section 119 of the Act to keep secret, and in any event, is information the Board for good policy reasons would not normally reveal. In

addition, CLAC asserted that there was no relevance to the information. The responding party employer ("Pre- Eng") took no position on this issue.

4. I was initially reluctant to reveal the information for two reasons. The first is the one articulated by CLAC, that any information may erode the secrecy of the membership evidence. While the Act says nothing about keeping secret the date on which cards were signed, the more information about what is on the card that is revealed, the more likely educated guesses can be made. Second, the information may tend to distort the evidence so that one or more parties may place greater emphasis on certain events than they initially believed was relevant, only because it fits with the pattern of card signing.

5. After examining the membership evidence, I concluded the dates on which the cards were signed should be disclosed for the following reasons. First, the information was arguably relevant. The Labourers have pleaded that their organizing campaign was cut short by what it says is the employer's support of CLAC, after the Labourers and Carpenters had begun their own organizing campaign. The dates on which cards were collected are relevant to that issue. In addition, the dates of the CLAC cards are relevant to the effect of certain alleged activities on February 8, 2006.

6. Second, the pattern of dates on the cards was such that it was not likely to distort any party's presentation of its case.

7. Finally, having looked at the dates of the cards, it appears to me that in assessing all of the evidence at the end of the case, I might well draw conclusions from the dates on the various membership cards. Once I have that information, and realizing that the information might inform the conclusions I come to, I conclude that the rules of natural justice require me to disclose the information to the parties. I therefore did so at the hearing before the first witness took the stand.

8. The cards are dated as follows. The CLAC cards are dated February 7, 8, and 9, 2006. The majority are dated February 8, 2006. (One card is dated "Jan. 7 02 2006", which I infer was February 7, 2006). The Labourers cards were dated January 29 and 30, February 1 and 15. The two cards signed on February 15 were a small proportion of the total number of cards submitted by the Labourers. The Carpenters' cards were all signed on January 29 and 30, 2006.

9. Following my oral disclosure of that information, Pre-Eng asked that the total numbers of cards in each application also be revealed. It was joined in this request by the Labourers. Essentially both parties wanted to know the "strength" of the applications of the three unions. However, in none of these files has there been a Regional Certification Meeting. Until the issues with respect to the composition of the list have been crystallized, the Board will not release the Form A-74. To do otherwise would be to be to open the door to changes of position based on the perception of the likely strength of the Union rather than a desire to identify which employees are actually in the appropriate bargaining unit. (Similarly, the Board will likely hold parties to their positions once the number of cards has been announced). For that reason, I will not disclose the numbers of cards in any of these applications.

0116-06-R International Union of Operating Engineers, Local 793, Applicant v. **Rainbow Concrete Industries Ltd.**, Responding Party.

Certification – Practice and Procedure – Status – In order to determine status disputes about whether certain employees were employed "in, at and out of" a certain address, the Board directed particularized "will say" statements and at the hearing into the matter asked additional questions to clarify some of the statements made – The Board found that where employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment – While the employees at issue sometimes worked "out of" the specific address, they were not primarily attached to this address – Matter continues

BEFORE: *Ian Anderson*, Vice-Chair.

APPEARANCES: *Bruce Price, Eric Giroux* and *Ken Lew* appeared on behalf of the applicant; *Jack Braithwaite, B. Naneff* and *Ethel Kingston* appeared on behalf of the responding party.

DECISION OF THE BOARD; June 29, 2006

1. This is an application for certification under the *Labour Relations Act*, 1995, S.O. 1995, c. 1, as amended (the "Act"). The application was filed on April 12, 2006. The union applied for the following bargaining unit:

> all employees of Rainbow Concrete Industries Ltd. working in, at, and out of 2477 Maley Drive Sudbury, Ontario save and except office and clerical staff, sales staff, students, non-working forepersons and persons above the rank of non-working forepersons.

2. The responding employer filed a response in which it agreed with the applicant's proposed bargaining unit, but gave notice under section 8.1 of the Act. The numerical difference between the parties was significant. By decision dated April 19, 2006, the Board directed a representation vote be held but the ballot box be sealed. A vote was held on April 21, 2006. The ballot box remains sealed.

3. There are a number of status disputes. One group of the status disputes relates to employees that the union states are not employed "in, at, and out of 2477 Maley Drive, Sudbury, Ontario". By decision dated June 2, 2006, the Board directed the employer to provide fully particularized "will say" statements of the anticipated evidence in chief of those individuals, and of the evidence in chief of any other witness it intended to call with respect to this issue.

4. On June 27, 2006, the Board directed the parties to address first a subset of those employees, specifically the following individuals the union states are drivers:

William Caibaiosai
Martin Champagne
Bruce Gardiner

Gilles Legault
Harvey Malette
Mike Martel
Gerald Menard
Pierre Menard
Herbert Padley
Michael Pedwell
Rene Turcotte

Through questions directed to the responding party the Board clarified some of the statements made in the will says. Counsel for the union was provided with an opportunity to do the same. At the conclusion of this process, both parties agreed that they were content that the necessary evidence was before the Board, with the exception of a dispute with respect to the degree of supervision exercised by Malette over other employees at the North Bay facility. The Board directed the parties to make submissions with respect to the status of the individuals, and indicated that if the status determination turned on the level of Malette's supervisory function, evidence would be heard on that issue at a later date.

Facts

5. The employer provides ready mix concrete, concrete block and concrete pre-cast products to customers through out Northern Ontario. 2477 Maley Drive, Sudbury, Ontario, is the location of its head office, one of its ready mix facilities, a block plant and plants for the production of various pre-cast products. It also has ready mix facilities at Elliot Lake, Blind River, Espanola, Dowling, Skead, Sturgeon Falls, South River, Parry Sound and North Bay. Its North Bay facility is also the location of a block plant and plant for production of various pre-cast products (some of which differ from the products produced at 2477 Maley Drive). In addition, the employer operates a gravel pit at its Skead location and has a quarry in Garson. It also has a wall panel plant at a different street address in Sudbury.

6. The employer treats its operations as one integrated whole. All employees are subject to the same terms and conditions of employment, which are centrally administered from 2477 Maley Drive and all telephone sales inquiries are answered at 2477 Maley Drive.

7. Dispatch functions are also centrally administered from 2477 Maley Drive. 2477 Maley Drive determines which drivers to send where and remotely controls the loading of ready mix product on to trucks at the other facilities through a computerized system. In dispatching trucks, the employer attempts to optimize the use of all of its ready mix trucks, irrespective of where they are based.

8. Drivers are "based" at certain facilities. This means that they will typically pick up at a particular facility at the beginning of a work day and return to the same facility at the end of that work day.

9. Caibaiosai, Champagne, Gardiner, Legault, Martel, Padley and Pedwell all primarily drive ready mix trucks. Cailbaiosai is based at Blind River. The remainder are based in North Bay. Some of them work out of 2477 Maley Drive, in Sudbury on occasion. The number of times (i.e. days) they worked out of 2477 Maley Drive ranged from a few per year, to a couple of

times per month, with periods of time when one of the drivers indicated he might work out of Sudbury a few times per week. In addition, the employer provided evidence of several large jobs to which it sends ready mix trucks from more than one of its facilities.

10. Pierre Menard is primarily based in North Bay. He drives a boom truck (i.e. a truck with a boom for loading and unloading materials), which is used to deliver pre-cast product to customers and to transfer it back and forth between the pre-cast production facilities at North Bay and 2477 Maley Drive. When performing this function, he typically picks up the boom truck in North Bay. He also performs forklift operator and labourer duties, typically at the North Bay facility.

11. Gerald Menard spends 80% of his time on basic truck and plant maintenance, primarily at the North Bay and Sturgeon Falls facilities. He has also done so at the Parry Sound facility. He has not done so at 2477 Maley Drive for over a year. In addition he fills in on ready mix trucks and boom trucks as necessary.

12. Turcotte is based in North Bay. His major assignment is driving a boom truck used to make deliveries in the North Bay and Sturgeon Falls area. He picks up his boom truck in North Bay. He fills in as necessary as a ready mix driver.

13. Malette works in sales and is responsible for safety and the proper operation of the plant in North Bay. He exercises a supervisory function with respect to North Bay plant employees. As noted, there is a dispute about the degree to which he also exercises supervisory responsibility over drivers when they are in the North Bay yard. In any event he spends about 90% of his time in North Bay. His other work is primarily related to testing of concrete at various project sites.

Analysis

14. The employer states that the term "working in, at, and out of 2477 Maley Drive, Sudbury, Ontario" in the bargaining unit description, and particularly the term "out of", is sufficiently broad to encompass its entire operation across Northern Ontario. The employer relies upon the uniform conditions of employment across its operation, the central control of its operation from 2477 Maley Drive, and the intermingling of drivers from its different facilities on various job sites. It argues that in interpreting the bargaining unit description the Board should address what is an appropriate bargaining unit for this employer through the application of four factors: community of interest; centralization of managerial authority; economic consequences of having one bargaining unit; and the source of work and where it emanates from. It argues that application of these factors results in the conclusion that there is only one appropriate bargaining unit, and that unit is the employer's entire operation.

15. The Board does not accept this analysis. By agreeing upon a bargaining unit description, the parties have agreed on what constitutes an appropriate bargaining unit. Further, the bargaining unit description agreed to by the parties is of the type that the Board has long used in the transport industry to certify employees of an employer based at a particular location where the employer operates terminals at more than one location: see *Capital City Transport Limited*, [1969] OLRB Rep. Feb. 1170. The Board's comments in *Western Inventory Services Ltd.*, [1989] OLRD No. 1852, at paragraph 25, are equally applicable to this case:

> In labour relations matters, the words "in and out of", "in or out of", "employed and working out of", and other similar language has often been used to deal with or describe an employer's mobile and peripatetic work force. In those cases, although the employer may have a fixed location, a "home-base" or "depot" in a particular municipality, the work activities of the employees can and do take the employees out of the geographic boundaries of that municipality. The use of these phrases therefore is designed to cover the employees while they are "on the road" in another geographic location, even though they are still working for the employer and will ultimately return or report back to their "home-base".

16. While it is not clear what separate meaning should be ascribed to the words "in" and "at" in the bargaining unit description agreed to by the parties in this case, for the purposes of the employer's argument the critical term is "out of". The parties, both of whom were represented by experienced counsel, must be taken to have understood the Board's longstanding practice with respect to the meaning to be ascribed to this term when they agreed to the bargaining unit description. Further, the Board is satisfied that on the facts of this case, the bargaining unit agreed to by the parties is an appropriate bargaining unit.

17. Do the disputed employees fall within the agreed upon bargaining unit? While the ready mix drivers are primarily based at other locations, on occasion, and to varying degrees, they worked out of 2477 Maley Drive in Sudbury. In cases in which employees work at or out of more than one site, for the purposes of determining whether they fall within a bargaining unit encompassing only one of those sites the Board considers to which site the employee has the greatest attachment: *Western Inventory Services Ltd.*, [1989] OLRD No. 1852, at paragraph 23; *R.W. Tomlinson Ltd.*, [2002] OLRB Rep. May/June 477 at paragraph 13. There can be no question that in this case the primary attachment of these ready mix drivers is not to 2477 Maley Drive. Accordingly, they are not employees within the bargaining unit, and they were not eligible to vote.

18. This conclusion applies with even greater strength to the other disputed employees who are the subject of this decision. There is even less evidence to suggest that their greater attachment is to 2477 Maley Drive in Sudbury. Accordingly, they are not employees within the bargaining unit, and they are not eligible to vote.

19. In the result, none of the 11 individuals listed in paragraph 4 are employees within the bargaining unit for the purposes of the section 8.1 determination, nor are they eligible to vote.

20. The Board notes that based on the will say statements filed by the employer, the same reasoning would appear to be applicable to the other employees identified by the union as not working in, at, and out of 2477 Maley Drive: Steve Hanselman, Raymond Penasse, Wayne Clarida, John Carney, Jeremy Brooks, Rob Daoust. Of these, only the employment status of Hanselman is relevant to the section 8.1 determination.

21. The hearing in this matter is scheduled to resume on July 4, 2006. When the hearing resumes the parties should come prepared to address first the status of those individuals who are relevant to the section 8.1 determination: Hanselman, Larry Daybutch, Brian Dwyer, Tim Krane, Corey Laforest, Clem Perron and Gilles Robert.

22. The Board directs the parties to consult with each other in an attempt to arrive at an orderly manner of proceeding. Counsel for both parties should, in any event, attend the hearing prepared to advise the Board of the full particulars of the material facts on which each relies in support of its position that a particular individual is, or is not, an employee within the bargaining unit.

0840-05-U Stephane Verreault, Applicant v. Teamsters Union Local 419, Responding Party v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 787), Intervenor.

Discharge – Duty of Fair Representation – The applicant alleged the union breached section 74 in connection with its failure to properly represent him in three terminations – The Board found the union did not violate the Act when it made decisions that were advantageous to the applicant – The union acted reasonably when it accepted the employer's offer to compensate the applicant between hearings for the applicant's second and third terminations; when it advised the applicant to accept an agreed statement of facts at arbitration; and when it entered into a Letter of Understanding with the employer – In its assessment of whether section 74 had been breached, the Board considered the grievor's conduct and found the applicant was uncooperative and antagonistic towards the union so as to irreparably fracture their relationship – Moreover, the applicant began to disregard the union's instructions and posted notices on the union's website alleging that the union business manager was stealing from the employer – When the union ordered the applicant to remove the postings the applicant ignored the union's warnings – The Board held that where a grievor fails to cooperate with a union, so that the union is unable to productively work with the grievor, or is unable to properly prepare for an arbitration, the union may, in extreme cases, be entitled to withdraw from the grievance – Application dismissed

BEFORE: *Peter F. Chauvin,* Vice-Chair.

APPEARANCES: *Stephane Verreault* appearing on his own behalf; *Marisa Pollock, Lindsay Lawrence* and *Doug Power* for the responding party; *Graham Williamson* for the intervernor.

DECISION OF THE BOARD; May 30, 2006

1. This is an Application Under Section 74 of the *Labour Relations Act, 1995,* S.O. 1995, c.1, as amended, (the "Act").

2. The Responding Party ("the Union") is the bargaining agent for some of the employees, including Mr. Verreault, employed in the Intervenor's ("the Employer") administrative office. The Employer terminated Mr. Verreault's employment three times.

Mr. Verreault submits that the Union breached section 74 in its representation of him regarding those three terminations. In particular, Mr. Verreault submits that the Union breached section 74 when it decided to no longer pursue his arbitration regarding his third termination.

3. The Union submits that it properly represented Mr. Verreault at all times. However, the Union submits that Mr. Verreault was extremely uncooperative, even to the extent that he interfered with and obstructed the Union's attempts to assist him, with the result that the Union ultimately had to conclude that it could no longer attempt to assist and represent Mr. Verreault and that there was no longer any merit to proceeding with the arbitration regarding Mr. Verreault's third termination. The Union submits that in doing so it did not breach section 74. The Employer supports the Union's position.

4. The facts are substantially not in dispute. The facts are chronicled in numerous documents, including the collective agreement between the Employer and the Union ("the Collective Agreement"), a Letter of Understanding dated July 9, 2002, a number of website postings and e-mails prepared by Mr. Verreault, numerous letters that Mr. Verreault has written to the Union, the Employer and the Board, and in the numerous pleadings and amended pleadings that the parties have filed.

5. What is in dispute is the conclusion that should be drawn from those facts. Mr. Verreault interprets the facts as meaning that the Union has breached section 74. The Union and the Employer submit that the facts establish that the Union properly represented Mr. Verreault and did not breach section 74. For the reasons that follow, I conclude that the Union properly represented Mr. Verreault and did not breach section 74.

6. As stated above, the parties have filed numerous letters and pleadings in this matter. These letters and pleadings contain numerous positions and arguments, some of which have been addressed by the Board in its earlier Decisions in this matter dated August 2, 2005, October 26, 2005, March 15, 2006 and April 10, 2006 and some of which appear to have been abandoned by the parties, or at least are no longer being actively pursued by the parties. In view of this, the Board informed the parties that they had to specifically raise, at the Consultation, any position or argument that they wanted the Board to consider. The Board informed the parties that any position or argument that was not specifically raised at the Consultation would be considered to have been abandoned.

7. Also, the Board asked Mr. Verreault whether he had any objections to the Board's jurisdiction to hear and determine this matter. Mr. Verreault stated that he had no such objections. Neither the Union nor the Employer raised any such objections either.

The Facts

8. For the purposes of Article 11.02 of the Collective Agreement, Mr. Verreault commenced his employment with the Employer to provide computer support services in April, 2002. Article 11.02 states that:

> New employees will be considered as probationary employees for the first ninety (90) days and the employment and the discharge

> of any such employee shall be at the sole discretion of the Employer.

9. Mr. Verreault was terminated, pursuant to Article 11.02, during his probationary period. This termination will hereinafter be referred to as his first termination.

10. The Union intervened on Mr. Verreault's behalf and by entering into a Letter of Understanding dated July 9, 2002 ("the Letter of Understanding") was able to secure Mr. Verreault's reinstatement as a part-time employee who would work 20 hours a week.

11. On November 19, 2002 Mr. Verreault was terminated a second time by Mr. Finelli, the Union's Business Manager. Mr. Verreault submitted that Mr. Finelli misinterpreted something that he said to Mr. Finelli, and that Mr. Finelli then swore at him and even struck him, and then terminated him. Accordingly, Mr. Verreault submitted that this termination was unjust. Ultimately, little turns upon exactly what occurred on November 19, 2002 because the Union filed a grievance regarding this termination, proceeded to arbitration and obtained full compensation for Mr. Verreault regarding this termination. This arbitration will be discussed in much more detail later in this Decision.

12. Following this termination, between November 19, 2002 and September 24, 2003, Mr. Verreault posted notices on his own website and on the Union's website and sent e-mails to the President of the Employer's international union and to contractors bound to the Collective Agreement in which Mr. Verreault made serious accusations against Mr. Finelli, including that he made death threats, engaged in criminal activities, belonged to a criminal organization and stole funds from the Employer. Mr. Verreault also encouraged employees of the Employer to lay criminal charges against Mr. Finelli, which Mr. Verreault said he would support, and encouraged members of the Employer to place the Employer in trusteeship and to not vote for Mr. Finelli in an upcoming election.

13. On February 5, 2003, the Union wrote to Mr. Verreault, informing him that he was not allowed to use the Union's website or the Union's name or logo and ordering him into remove his postings from the Union's website. The Union informed Mr. Verreault that if he felt that he had been harassed by Mr. Finelli, the Union would assist him with that. The Union warned Mr. Verreault that both the Union and the Employer could commence lawsuits against him regarding his statements and conduct. Mr. Verreault generally rebuffed these warnings, stating that his statements were true and his conduct was therefore appropriate.

14. On March 12, 2003, the Employer wrote to the Union, demanding that it remove Mr. Verreault's postings from the Union's website and that it post a retraction and apology. The Employer stated that it would commence a lawsuit if this did not occur immediately.

15. On September 12, 2003, the Employer informed the Union that it would be relying upon Mr. Verreault's post-discharge conduct to support its November 19, 2002 termination. In a subsequent letter, the Employer stated that "Mr. Verreault's conduct has irrevocably damaged the bond of trust required between an employer and employee" and provided the particulars and documents it intended to rely upon at the arbitration. The Employer attached to its letter the website postings and the e-mails referred to above.

16. In addition to this, on September 24, 2003, the employer wrote to Mr. Verreault, stating that:

> You were terminated from your employment with U.A. Local 787 on November 19, 2002. Since that time you have frequently and publicly expressed your contempt for UA Local 787 and its Business Manager using your website as well as documents sent to the international union and others. Additionally, you have sought to interfere with our internal elections and to interfere with our contractual relations with contractors by directing false and malicious information to them. This constitutes serious and malicious misconduct and has resulted in an irreparable breach of trust.
>
> We advise that in the event your termination is set aside by the Arbitrator, you will be forthwith suspended without pay pending investigation. After our review of the evidence, you may be subject to further discipline up to and including termination.

17. The arbitration regarding Mr. Verreault's second termination commenced on October 15, 2003. The Employer informed the Union that it intended to rely upon the post-discharge misconduct to further support its November 19, 2002 termination of Mr. Verreault. The Union objected to this, stating that the Employer could not rely upon this post-discharge conduct. The Union also raised a number of other arguments in support of Mr. Verreault's grievance. These arguments were addressed at a subsequent arbitration Hearing held on February 23, 2004.

18. In an Award dated March 15, 2004, the Arbitrator ruled on these arguments. Most importantly, the Arbitrator upheld the Union's objection, ruling that the Employer could not rely upon Mr. Verreault's post-discharge conduct to support the November 19, 2002 termination. Rather, the Arbitrator ruled that this conduct was of a very different nature and would have to be dealt with in a separate arbitration.

19. In view of this, the Employer informed the Union that it no longer wished to arbitrate the November 19, 2002 termination. Rather, the Employer stated that it was prepared to pay Mr. Verreault full compensation for the period between November 19, 2002 and September 24, 2003. The Employer also stated that, based upon its September 24, 2003 letter, it considered Mr. Verreault to have been terminated a third time as of September 24, 2003 and stated that it would arbitrate that third termination before the same Arbitrator. The Union informed the Arbitrator of this at an arbitration held in this matter on October 6, 2004. The Arbitrator recorded the Employer's statements in an Award dated October 12, 2004 and ordered the Employer to pay Mr. Verreault the required compensation.

20. The Union did not object to this, given that it resolved Mr. Verreault's second termination in his favour, secured full compensation for Mr. Verreault regarding his second termination and would expedite the arbitration of his third termination. The Union had no control over the Employer's decision to terminate Mr. Verreault a third time for his post November 19,

2002 conduct, and felt that this was the best way to deal with the Employer's decision to terminate Mr. Verreault a third time.

21. However, Mr. Verreault objected greatly to what had occurred. So much so that on October 26, 2004 he filed an Application for Judicial Review regarding the October 12, 2004 Award. Mr. Verreault also wrote letters of complaint directly to the Arbitrator. At some point, Mr. Verreault also maintained that the Union did not represent him properly when it entered in to the Letter of Understanding.

22. The Union attempted to continue to represent Mr. Verreault in the arbitration regarding his third termination. With regard to the third termination, all of the Employer's allegations regarding Mr. Verreault's post-discharge misconduct were contained in Mr. Verreault's own website postings and e-mails. Mr. Verreault was not disputing that he authored these website postings and e-mails. Accordingly, the Employer proposed that it be agreed that Mr. Verreault authored and sent these website postings and e-mails so that the Employer and the Union would only have to argue whether these website postings and e-mails establish just cause for Mr. Verreault's third termination. The Union was prepared to argue that these web site postings and e-mails did not establish just cause for Mr. Verreault's third termination. Accordingly, the Union proposed to Mr. Verreault that the arbitration proceed in this manner.

23. Mr. Verreault disagreed with this proposal and became very antagonistic towards the Union. It became very difficult for the Union and Mr. Verreault to communicate productively and work together. An agreement was never reached as to exactly how the Union would proceed with the arbitration regarding Mr. Verreault's third termination. Ultimately, for reasons to be explained later in the Decision, this third termination was never arbitrated.

24. Mr. Verreault also objected, on several grounds, to the amount that the Employer was prepared to pay him as compensation for the period November 19, 2002 to September 24, 2003. The Union put forward Mr. Verreault's arguments at an arbitration held on February 21, 2005. In an Award dated February 23, 2005 the Arbitrator ruled upon all of the issues regarding the amount that Mr. Verreault was entitled to under the October 12, 2004 Award.

25. On May 24, 2005 the Divisional Court dismissed Mr. Verreault's Application for Judicial Review. Mr. Verreault was ordered to pay the Union and the Employer costs.

26. On June 13, 2005 Mr. Verreault filed this section 74 Application. Since then, Mr. Verreault has filed numerous amendments to this Application and has written numerous letters to the Union, the Employer and the Board. It is clear from these pleadings and letters that Mr. Verreault did not trust the Union and was very antagonistic towards the Union. The Union and the Employer filed several submissions in reply to Mr. Verreault's pleadings and letters.

27. The next arbitration date was set for July 26, 2005. However, in view of the recently filed section 74 Application, the clear mistrust and animosity that Mr. Verreault had for the Union, and the resulting inability of Mr. Verreault and the Union to work productively together, the Union and the Employer decided to adjourn the July 26, 2005 arbitration date.

28. In a Decision dated August 2, 2005, the Board addressed many of the issues raised in the numerous pleadings and letters that were filed in this matter. Most significantly, the Board noted that the arbitration regarding Mr. Verreault's third termination was still ongoing and ruled that:

> Accordingly, it cannot be assessed at this time whether the Union has represented Mr. Verreault fairly in connection with this arbitration. As such, this Application is premature at this point and will not be considered further until the Union's representation of Mr. Verreault in connection with his discharge grievance is concluded. At that point in time, Mr. Verreault may either file further amendments to this Application, if he wishes to, regarding the further representation of him by the Union in connection with his discharge grievance, or Mr. Verreault may, in the absence of filing such an amendment, inform the Board to the wants the Board to consider his Application further. However, as stated above, Mr. Verreault may not do either of these until the Union's representation of him in connection with his discharge grievance is concluded.

29. This resulted in numerous more letters from Mr. Verreault to the Union, the Employer and the Board. Again, these letters display a great amount of mistrust and antagonism. Also, Mr. Verreault filed a separate Application for Interim Order. The Board dismissed this Application for Interim Order in its Decision dated October 26, 2005.

30. On August, 2005 the Arbitrator who was hearing the arbitration resigned from his arbitration practice and notified the Union and Employer that he would not be proceeding any further with the arbitration. This further complicated this matter.

31. Since the Board's August 2, 2005 Decision, Mr. Verreault, Union and the Employer have all stated that they consider the arbitration regarding the third discharge to be concluded and requested that the Board schedule this Consultation regarding this section 74 Application.

32. At the Consultation the Union stated that it has come to the conclusion that it cannot work in any productive manner with Mr. Verreault and has concluded that there is no merit in its attempting to proceed any further in the arbitration regarding Mr. Verreault's third termination. As such, the Union stated that it would not be referring the arbitration to a new Arbitrator.

The Issues

33. An important starting point is to define what the issues are in this section 74 Application. The first issue is whether this section 74 Application is a substitute forum to arbitrate Mr. Verreault's grievances. The second issue is whether the Union violated section 74 when it made decisions regarding Mr. Verreault's grievances. A rough simplification of this is whether the Union acted reasonably when it made those decisions. The third issue is whether the Board can take in to consideration Mr. Verreault's conduct when it assesses whether the Union violated section 74.

Not a Forum for arbitration

34. The issue in this case is not whether Mr. Verreault would have been successful if the Union had proceeded with his arbitration regarding his third termination. The role of the Board in a section 74 Application is not to substitute itself for the Arbitrator and determine, as if it were the Arbitrator, whether Mr. Verreault would have succeeded at the arbitration. Rather, the role of the Board is to determine whether the Union acted in a manner that was arbitrary, discriminatory or in bad faith when it made decisions regarding Mr. Verreault's grievances. To determine this, the Board may have to look in to the underling facts pertaining to the grievance to assess whether the union's decisions appear to have been reasonable. However, in doing so, the Board is not conducting a Hearing into the merits of the grievance. A section 74 Consultation is not a substitute forum to hold a grievance arbitration.

Disagreement with the Union's Decisions

35. Also, the issue is not whether every decision that Local 222 made was completely correct or the best possible decision, as now reviewed by the Applicants and the Board, with the benefit of hindsight. Nor is the issue whether the Applicants or the Board simply disagree with one or more of the decisions of the Local 222. Such a standard would be stifling for a union and would encourage employees to challenge every decision that their union made, if the outcome was not to the complete satisfaction of the employee. Accordingly, a union is held to a lower standard than correctness. The Board will find a contravention of section 74 only where the union's conduct is much more severe than amounting to a decision which the applicant feels is inappropriate or wrong. In *ITE Industries*, [1980] OLRB Rep. July 1001, the Board expressed the test to be applied as follows:

> It is clear that in order to establish a breach of section 68 [now 74], a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a "flagrant error" consistent with a "non caring attitude", or have acted in a manner that is "implausible" or "so reckless as to be unworthy of protection". In other words, the trade union's conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee's concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

36. Also, the union's conduct is measured by an objective standard of review, not a subjective one, as a set out in the following passage from *Dufferin Aggregates*, [1982] OLRB Rep. Jan. 35:

> The Board must obviously use great care in assessing what is and what is not objective justification for a union's decision, particularly a decision relating to choices as to the allocation of goods in conditions of scarcity. In my view it would be clearly inappropriate for the Board to substitute its own view for the union's by simply asking itself whether it would have acted differently. To do that is to substitute one subjective standard for

> another, and not to consider the issue of objective justification. The appropriate standard to be adopted by this Board is not unlike that expressed by the Court in the judicial review of the decisions of arbitrators: the Board should ask not whether the decision is right or wrong or whether it agrees with it – rather it should ask whether it is a decision that could reasonably be made in all of the circumstances, even if the Board might itself be inclined to disagree with it. Used in this sense "reasonable" must mean by the rational application of relevant factors, after considering and balancing all legitimate interests and without regard to extraneous factors.

37. Also, it is quite clearly established that a union is not required to process every grievance to arbitration. Rather, as is stated in *Catherine Syme*, [1983] OLRB Rep. May 775, a union is entitled to take in to consideration several factors in assessing whether it should process the grievance, as long as the union acts in good faith in doing so:

> 20. Section 68 [now 74] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining union who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official – especially an elected one – cannot be expected to exhibit the skills, ability, training and judgment of a lawyer.

38. See also *Lear Corporation Canada Ltd.*, [2004] O.L.R.D. No. 1492 and *George Lee*, [1994] OLRB Rep. Aug. 1009.

Failure to Cooperate

39. One of the factors that a union can take into consideration in determining whether it should, or can, continue to process a grievance is whether the grievor is cooperating with the union. The Act requires that a union represent the employees for whom it is the exclusive bargaining agent. However, a union cannot do this in the absence of cooperation from the employee. If a grievor fails to cooperate with a union, with the result that the union is unable to productively work with the grievor, or is unable to properly prepare for the arbitration, the union may, in extreme cases, be entitled to withdraw from the grievance. If this occurs, the grievor may choose to file a section 74 Application to have the Board review whether the union's withdraw from the grievance amounts to a violation of section 74.

40. In such a case, the Board has to determine whether the union's withdrawal from the grievance was warranted. In some cases, the Board may determine that the union's representation

of the grievor was proper and the grievor's dissatisfaction and uncooperative conduct was therefore unwarranted. If this is the case, the union's withdrawal from the grievance would be justified and would not amount to a violation of section 74. See *Paul Balkos*, [1989] OLRB Rep. Sept. 932; *Covington Clarke*, [1994] OLRB Rep. June 649; *Northwestern General Hospital*, [1996] O.L.R.D. No. 3443; *Hurley Corp.*, [2001] O.L.R.D. No. 1052; *Securitas Canada Ltd.*, [2003] O.L.R.D. No. 2584; John *Pacheco*, [2004] OLRB Rep. May/June 643; *Humber River Regional Hospital*, [2005] O.L.R.D. No. 2415; *Peel District School Boardl*, [2005] O.L.R.D. No. 2085.

41. However, in other cases, the Board has cautioned that the duty of fair representation is quite extensive and that a union must therefore be very careful before it concludes that it can no longer represent one of its members. See *Raymond McLeod*, [1987] OLRB Rep. Apr. 547 in which the Board stated that:

> However, the union's duty affair representation in these circumstances is not dependent upon the degree to which an employee can provide assistance in its own cause. The proscription against arbitrary conduct in section [74] is predicated on the fact that the union has been accorded exclusive rights to represent employees in their labour relations. The exclusivity of the union mandate carries with it certain responsibilities with respect to the exercise of that representation which are appropriately attendant on a role of such significance. It follows that the core of the duty of fair representation obtains regardless of the efforts which may or may not be made by the employee himself. Indeed, in practical terms, it may well be that an employee who is least able to be effective on his own behalf may be in most need of the protection offered by section [74].
>
> This does not mean that in evaluating the union's conduct, an employee's own behaviour will be ignored by the Board. To the extent that such behaviour forms part of the backdrop or context against which the union's actions will be assessed, is one of the many factors which the Board may consider in arriving at a decision in appropriate cases. While it does not relieve the union of its responsibilities under the duty affair representation, it may help to shape the contours of that duty in particular cases.

42. Similarly, in *United Textile Workers of America (Local 478) (Re: Yvonne Couperus)*, [1995] OLRB Rep. Sept. 1193, the Board cautioned that:

> A trade union's duty of fair representation to a bargaining unit employee is not in any way lessened because of a particular employee's level of sophistication, education, or a tendency to utilize poor judgment in his or her interactions with his or her employer, the trade union, or both. Nor is that duty lessened because one or more officials of the trade union perceive, rightly or wrongly, that the employee does

> not trust or respect him, her, or the bargaining agent. The trade union must deal with these difficult employees in the same way they deal with all other employees - in a manner which is devoid of bad faith, and is not arbitrary or discriminatory.

43. As such, the Board may conclude, in appropriate cases, that the union's representation of the grievor was improper and that caused the grievor to become dissatisfied and uncooperative with the union. In such a case, both the union's earlier representation of the grievor the union's withdrawal from the grievance may amount to a violation of section 74.

44. Accordingly, it becomes a case of the chicken and the egg. What caused the relationship to break down? Was it improper representation by the union, or was it unwarranted uncooperative conduct by the grievor? The Board must carefully review the facts to determine this.

Analysis and Findings

45. Upon reviewing the facts of this case, the Board concludes that the Union's representation of Mr. Verreault was appropriate and that Mr. Verreault's uncooperative conduct and antagonism towards the Union was therefore unwarranted. The Board also finds that Mr. Verreault's conduct was so severe that it irreparably fractured the relationship between Mr. Verreault and the Union, with the result that the Union could no longer work productively with Mr. Verreault. The Board finds that this warranted the Union's withdrawal from the arbitration regarding Mr. Verreault's third termination. Accordingly, the Union has not violated section 74. The Board comes of these conclusions for the following reasons.

46. In 2002, the Union clearly represented Mr. Verreault in an appropriate, if not exemplary, manner. Mr. Verreault was terminated during his probationary period. Article 11.02 of the Collective Agreement provided that Mr. Verreault could be terminated "at the sole discretion of the Employer". Notwithstanding this, the Union intervened on Mr. Verreault's behalf and was able to secure his reinstatement by entering into the Letter of Understanding dated July 9, 2002. In achieving such a favourable result, the Union provided Mr. Verreault with very able representation. Mr. Verreault did not complain about this representation at that time.

47. The Union continued to represent Mr. Verreault properly when he was terminated for the second time on November 19, 2002. The Union filed a grievance and referred that grievance to arbitration. However, between November 19, 2002 and September 24, 2003, Mr. Verreault made a number of postings to in his own website and the Union's website and made a number of statements regarding Mr.Finelli which the Employer found to be offensive and very damaging to the Employer and Mr. Finelli. As a result of this, the Employer stated that it intended to rely upon this misconduct to support its November 19, 2002 termination of Mr. Verreault. The Union objected to this, stating that the Employer could not rely upon this alleged misconduct at the arbitration to support its November 19, 2002 termination of Mr. Verreault. The Arbitrator accepted the Union's position. Again, the Union represented Mr. Verreault ably in connection with this.

48. Faced with this, the Employer decided to not arbitrate the second termination, but rather decided to fully compensate Mr. Verreault for the period between November 19, 2002 and September 24, 2003. The Employer made this decision, not the Union. The Union was not in a position to determine or control how the Employer would deal with the Arbitrator's ruling regarding the November 19, 2002 termination. The Employer's decision regarding the November 19, 2002 termination was advantageous, not detrimental, to Mr. Verreault. The Union did not violate section 74 in not objecting to the Employer's position.

49. The Union also acted reasonably and appropriately when it proposed that Mr. Verreault's actions between November 19, 2002 and September 24, 2003 be accepted as agreed facts at the arbitration regarding Mr. Verreault's third termination and that the Union thereafter argue that these facts however do not amount to just cause for Mr. Verreault's third termination. Mr. Verreault was not disputing that he had engaged in this conduct. To the contrary, he was freely agreeing that he had engaged in the conduct and was maintaining that he had done nothing wrong by doing so. Accordingly, the Union's proposal that these facts be agreed to was quite appropriate, and arguably the best way to proceed. The Union was prepared to argue that these facts did not amount to just cause. The Union did not violate section 74 by making this proposal.

50. It was around to this time that Mr. Verreault became quite antagonistic towards the Union. Mr. Verreault now, for the first time, objected to the Union having entered in to the Letter of Understanding dated July 9, 2002. Mr. Verreault also objected to the Union's decision to not object to the Employer's decision to fully compensate him for the period between November 19, 2002 and September 24, 2003 and also the Union's proposal that his actions between November 19, 2002 and September 24, 2003 be accepted as agreed facts. Mr. Verreault began to write letters to the Union and the Arbitrator, stating his objections. However, it does not appear that Mr. Verreault had reasonable grounds for his objections. The Union submits that throughout the course of the grievance proceedings, Mr. Verreault became increasingly disruptive of the proceedings and began to ignore the advice of counsel. In view of Mr. Verreault's pleadings and letters and his conduct and the statements that he made at the Consultation, I accept the Union's submissions in this regard. Mr. Verreault also filed an Application for Judicial Review. The Application for Judicial Review was subsequently dismissed.

51. Mr. Verreault then filed this section 74 Application and later filed an Application for Interim Order. Mr. Verreault wrote numerous letters to the Union, the Employer and the Board. Mr. Verreault's letters clearly display that he had a strong distrust and antagonism for the Union and was unwilling to cooperate with the Union. The Board issued its August 2, 2005 Decision, ruling that it was premature to consider his section 74 Application and dismissing his Application for Interim Order. Mr. Verreault continued to write numerous letters to the Union, the Employer and the Board. Again, these letters displayed that Mr. Verreault was highly antagonistic of and uncooperative with the Union. Ultimately, the Union concluded that it could no longer represent Mr. Verreault.

52. I find that Mr. Verreault's antagonism towards and distrust of the Union was unwarranted. The Union's representation of Mr. Verreault was reasonable and appropriate. Mr. Verreault had no reasonable or legitimate grounds for becoming uncooperative with the Union. Mr. Verreault's antagonistic and uncooperative conduct towards the Union made it impossible for the Union to continue to represent Mr. Verreault. The Union's representation of

Mr. Verreault and the Union's ultimate decision that it could not continue to represent Mr. Verreault do not amount to a violation of section 74.

53. This Application is dismissed.

3823-05-ES TCS Express Inc., Applicant v. Robina Yasin and Director of Employment Standards, Responding Parties.

Employment Standards – The employer claimed that the respondent was not entitled to overtime since she failed to observe the company's policy, which prohibited employees from engaging in work beyond the regular work period, and required authorization from the supervisor for any overtime – The employer also argued that the Employment Standards Officer should not have considered meal periods in any calculation of overtime – The respondent claimed that she repeatedly obtained verbal permission to do overtime work, and did not receive an uninterrupted lunch period throughout the course of her employment – The Board determined that, in light of subsection 6(1) of *O. Reg. 285/01*, the applicant's policy on overtime did not exclude the respondent from obtaining accumulated overtime pay – The Board found that it was appropriate to include in the overtime calculation that period of time where the respondent did not have the opportunity to take an uninterrupted meal period – Application granted, in part

BEFORE: *Patrick Kelly*, Vice-Chair.

APPEARANCES: *Mahmood Hassan, Sami Bin Saad* and *Kamlesh Raval* appearing for the applicant; *Robina Yasin* appearing on her own behalf; no one appearing for the Director of Employment Standards.

DECISION OF THE BOARD; June 8, 2006

1. This is an employer application under the *Employment Standards Act, 2000* S.O. 2000, c.41, as amended (the "Act") for review of an Order to Pay No. 05886.

Background

2. The Employment Standards Officer ("the Officer") determined that the responding party, Robina Yasin ("Ms. Yasin"), was entitled to 74 hours of overtime pay, but not to termination pay. The Officer's order to pay was for $1,241.22, and she imposed the usual 10 per cent administration fee, of $124.12.

3. In this review, the applicant, TCS Express Inc. (or "TCS") takes the position that the overtime was not authorized, and that Ms. Yasin was required to seek permission in writing before engaging in any overtime. The applicant also says the Officer's findings failed to take into account paid meal periods Ms. Yasin took over the course of her employment in calculating the overtime.

4. During her opening statement, Ms. Yasin told the Board that her overtime was approved verbally, and that she repeatedly asked to be paid overtime from near the beginning of her employment, which commenced on August 12, 2004 and ended in her termination on May 13, 2005. She claimed the applicant was largely unresponsive to her demands for overtime pay, and delayed paying her. Ms. Yasin said she was dismissed shortly after she refused the applicant's directive to begin working Saturdays. As for meal periods, Ms. Yasin said she took her meals at her desk, where she dealt with customers who arrived at the applicant's office. She claimed she never received an uninterrupted thirty minute meal period throughout her employment.

5. Ms. Yasin did not, in the course of her opening statement or final argument, say that she was claiming a reprisal or claiming termination pay in the context of this application. However, when it came her turn to give testimony in this proceeding, following the testimony of two witnesses for the applicant, it became clear that she drew a link between her demands for overtime and her termination in May 2005. She did not ask the Board for any remedies or attempt to prove any damages arising from an alleged reprisal. Moreover, because Ms. Yasin gave no indication in her opening statement that she was alleging a reprisal (other than her claim that she was terminated after refusing work on Saturdays, which on its face, does not constitute a reprisal within the meaning of section 74 of the Act), the applicant did not address that issue through its witnesses when it called its evidence. This decision, therefore, deals only with whether or not Ms. Yasin was entitled to overtime pay.

The Evidence

6. Sami Bin Saad, TCS's General Manager, was the first witness called by the applicant. He described the applicant's business in relation to the Pakistani Consulate ("the Consulate"), where Ms. Yasin initially performed much of her work for TCS. TCS is mandated by the Consulate to arrange the pick-up and delivery of packages and documents (visa and passport applications, endorsements of birth registrations, and so forth) on behalf of the Consulate's "customers". The applicant's service is one of convenience. It eliminates the need for Consulate customers to stand in line and wait for their documents to be processed.

7. Ms. Yasin began employment with TCS on August 12, 2004 as a Customer Service Representative ("CSR") pursuant to a written job offer which set out what Mr. Saad said constituted all the terms of her employment. The written offer referred to the primary job responsibilities in an attached job description. It also indicated that Ms. Yasin would earn a salary of $1,800.00 per month, and that her hours of work would be 9:00 a.m. to 6:00 p.m., Monday to Friday, although, due to the nature of the business, she would occasionally have to work outside the normal hours and days.

8. Like the other TCS employees, Ms. Yasin was required to swipe a time card through the applicant's time clock when she arrived for work at the TCS Mississauga office, and again when she left the office in the evening. TCS uses the swipe card information to determine overtime. TCS pays overtime at time and one-half for all hours in excess of 44 in a week.

9. When her job changed in early November 2004, Ms. Yasin came to work generally within a few minutes of her new start time of 10:00 a.m. Her hours changed again in early December, from 11:00 a.m. until 8:00 p.m..

10. Until early November 2004, Ms. Yasin's job as a CSR was to arrange the pickup of documents at the airport, to deliver them to the Consulate for processing, and then take the processed documents to the applicant's offices for the purpose of further distribution to the Consulate's customers. Ms. Yasin was also expected to solicit business while attending at the Consulate, from the Consulate's walk-in customers who might benefit from the convenience offered by the applicant's services. Her direct supervisor at all times was Syed Karim.

11. The Consulate opens at 9:30 a.m. and conducts business until 12:30 p.m. At that point, the Consulate stops dealing with its customers (except those individuals who arrive just before closing). Ms. Yasin was expected to be at the Consulate when it opened.

12. Mr. Saad testified that he occasionally visits the Consulate. He said he was there two or three times when Ms. Yasin was there, and he observed her during business off-hours, between 12:30 and 2:00 p.m., having her lunch in a lunch room, or reading a newspaper, or just resting her eyes. Mr. Saad testified that the period from 12:30 p.m. until 2:00 p.m. was her own to do with as she wished. (I note, however, that Ms. Yasin's job description states that she is to leave the Consulate no later than 1:00 p.m. after the closing of the Consulate's counters.) When Ms. Yasin cross-examined Mr. Saad she expressed some disbelief that he ever observed her during his visits to the Consulate. Mr. Saad insisted he had. When Ms. Yasin testified later, she said she had no down-time between 12:30 and 2:00 p.m., and that she was busy with her tasks. She said she had no time to take a 30 minute meal period. None of these assertions was put to Mr. Saad during his cross-examination.

13. On August 18, 2004, Ms. Yasin's supervisor, Mr. Karim, issued an e-mail to all the Customer Service Representatives, including Ms. Yasin, stating that they must obtain prior approval from him in order to stay at the TCS office later than their designated end time. Failure to do so would disentitle the individual from entitlement to overtime.

14. Mr. Saad authored a letter dated November 9, 2004, in which he formally advised Ms. Yasin that, effective November 4, 2004 her job duties were to change. He provided her a new job description. She would remain a Customer Service Representative, but she no longer had responsibility for attending at the Consulate, although she continued to handle Consulate shipments delivered to the TCS office. The new job description describes that function, and a number of sales and customer relations activities over the telephone and with walk-in customers.

15. Kamlesh Raval was the other witness who testified on behalf of the applicant. He is the applicant's Manager of Finance and Administration. He had no supervisory responsibility for Ms. Yasin. He worked at the TCS office when Ms. Yasin's duties changed early in November 2004. Mr. Raval said he saw Ms. Yasin routinely taking her lunch in a back room when she worked at the TCS office. He also told the Board that he understood that there were always two CSR's at a time assigned to answer the telephone, while the other two CSR's had lunch, and vice versa.

16. Mr. Raval explained that he is responsible for TCS's payroll, which is outsourced to a third party payroll company. Mr. Raval provides all the necessary information to the payroll company, which in turn, processes the pay stubs and facilitates direct deposit of wages into the employees' bank accounts.

17. According to Mr. Raval, the employees' supervisors authorize overtime. Mr. Raval will not authorize payment of the overtime without written authorization of an employee's supervisor (or in the odd case, the employee's manager, which in Ms. Yasin's case, was Lubina Sami). Mr. Raval produced the written authorizations he received from Ms. Yasin's supervisor, Mr. Karim. One such e-mail, dated March 28, 2005, instructed Mr. Raval to pay overtime for 2 hours and 15 minutes. In another e-mail, dated April 27, 2005, Mr. Karim directed Mr. Raval to pay one hour of overtime to Ms. Yasin for work done on April 12, 2005. In each case, Ms. Yasin was seeking more than what Mr. Karim was prepared to authorize. From what I can tell from these e-mails, Mr. Karim authorized a total of 3.5 hours overtime for Ms. Yasin.

18. Mr. Raval prepared a summary of overtime authorizations for five Customer Service Representatives, including Ms. Yasin, for the period from January 4, 2004 until April 30, 2005. The summary refers to the e-mails described in the preceding paragraph, as well as a March 24, 2005 e-mail from Mr. Karim, which was not produced during the hearing. According to the summary, the March 24, 2005 e-mail authorized one hour and forty-five minutes overtime for Ms. Yasin. The summary indicates a total of seven and one-half hours authorized overtime for Ms. Yasin over the course of her entire employment.

19. TCS produced a copy of an excerpt from its payroll company's payroll register. It sets out the details of wages and deductions in an unspecified pay period for a number of employees, including Ms. Yasin. The record in respect of Ms. Yasin indicates that her year-to-date earnings were at that point in time $10,125.00, which, by my calculations places her in about early December 2004. The record indicates that her year to date overtime hours were already 15.5 at that point. That would suggest that Mr. Raval received e-mail authorizations from Mr. Karim for Ms. Yasin in 2004, none of which were produced in the hearing by the applicant.

20. Ms. Yasin was the last witness to testify. In the course of her evidence, she produced a number of documents (Exhibits 6 to 19) which she did not put to Mr. Saad or Mr. Raval when she briefly cross-examined them. (I shall return to the significance of Ms. Yasin's failure to confront the applicant's witnesses). The documents included a punch clock record prepared by the applicant of Ms. Yasin's hours of work and overtime (Exhibit 9) over the course of her employment. Exhibit 9 indicates she worked 89.8 hours of overtime. TCS accepted that Exhibit 9 was accurate except that it did not take into account meal periods, and therefore failed to gauge the true extent of Ms. Yasin's overtime.

21. The applicant did not object to the introduction of any of these documents as Ms. Yasin identified them in her examination-in-chief, with the exception of one, an April 28, 2005 e-mail exchange between Mr. Karim and a co-worker of Ms. Yasin's, which the applicant argued was irrelevant. When the applicant's representative questioned Ms. Yasin in cross-examination as to why she had not put the documents to Mr. Saad and Mr. Raval, or why she did not challenge their versions of events, where they differed from hers, she said she simply did not know any better.

22. In assessing the weight of Ms. Yasin's testimony, it is important to note that the applicant did not call Ms. Yasin's supervisor, Mr. Malik, nor Ms. Yasin's manager, Lubina Sami. Neither Mr. Saad nor Mr. Raval made any decisions about whether or not Ms. Yasin worked overtime. That fell to Mr. Malik chiefly, and to Ms. Sami where necessary. They did not testify,

and so Ms. Yasin had no real opportunity to challenge witnesses with direct knowledge of how overtime assignments were made. Ms. Yasin was, however, in a position to challenge Mr. Saad's testimony that he saw her at the Consulate on several occasions taking her lunch break, or his assertion that she had free time between 12:30 p.m. and 2:00 p.m. each day. She also had the opportunity to challenge Mr. Raval's observation that he saw her routinely taking a lunch break at the TCS office (although he did not say that he observed her taking 30-minute, uninterrupted lunch breaks). She did not confront those allegations directly in her cross-examination of either witness. I therefore put little weight on her testimony that she never took a meal period of thirty minutes over the entire course of her employment.

23. As I have indicated, the TCS time clock records (Exhibit 9) indicate that Ms. Yasin worked 89.8 hours overtime while employed with the applicant, though TCS takes the position that this does not take into account the fact that Ms. Yasin was entitled to a daily lunch period. However, Ms. Yasin testified, without challenge, that when she worked at the TCS office, she handled the walk-in customers as they arrived at the front door. To the extent she took meal periods, they would inevitably be interrupted because of the walk-in customers. Her revised job description specifically required that she deal with walk-in customers and that she maintain close and professional relationships with TCS customers; it did not give her the option of ignoring the customers until the completion of her lunch. In this sense, there may have been an expectation that Ms. Yasin be available at all times in the course of her work day to deal with TCS's business exigencies.

Analysis

24. Subsection 22(1) of the Act states:

> **22.** (1) An employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each week or, if another threshold is prescribed, that prescribed threshold.

Section 6 of *O. Reg. 285/01*, passed pursuant to the Act, states:

> **6.** (1) Subject to subsection (2), work shall be deemed to be performed by an employee for the employer,
>
> (a) where work is,
>
> (i) permitted or suffered to be done by the employer, or
>
> (ii) in fact performed by an employee although a term of the contract of employment expressly forbids or limits hours of work or requires the employer to authorize hours of work in advance;
>
> (b) where the employee is not performing work and is required to remain at the place of employment.

> (i) waiting or holding himself or herself ready for call to work, or
>
> (ii) on a rest or break-time other than an eating period.
>
> (2) Work shall not be deemed to be performed for an employer during the time the employee,
>
> (a) is entitled to,
>
> (i) take time off work for an eating period,
>
> (ii) take at least six hours or such longer period as is established by contract, custom or practice for sleeping and the employer furnishes sleeping facilities, or
>
> (iii) take time off work in order to engage in the employee's own private affairs or pursuits as is established by contract, custom or practice;
>
> (b) is not at the place of employment and is waiting or holding himself or herself ready for call to work.

25. Subsection 6(1) of *O. Reg 285/01* is a complete answer to the applicant's contention that it was not required to pay overtime to Ms. Yasin because there was a policy in place prohibiting employees from staying in the workplace beyond their quit time, and requiring pre-authorization of overtime from Mr. Karim. Assuming, without deciding, that the policy was strictly enforced, subsection 6(1)(a)(ii) deems whatever work Ms. Yasin did for TCS to be work performed for the purposes of the Act, including for the purposes of overtime under section 22 of the Act, even if the work was done in violation of TCS's policy. TCS's policy on overtime does not operate to disentitle Ms. Yasin from overtime. It was, of course, open to TCS to discipline Ms. Yasin for breaches of that policy, if indeed she ever actually ran afoul of it. But denying her overtime pay was not an option, given the language of the Regulation and the Act.

26. I turn to the more difficult issue regarding the calculation of overtime, taking into account meal periods.

27. In *Endless Electronic Distributors, Inc.* E.S.C. 1648 (June 13, 1984) the responding party employees worked from 8:30 a.m. to 5:00 p.m. with a one-hour lunch break. The initial order of the Employment Standards Officer included the lunch hour in the calculation of working hours. The applicant argued that the hours of overtime should be reduced by one hour each day to account for the lunch break. The Referee agreed and adjusted the order accordingly. He stated at pages 4 and 5:

> By virtue of Section 25 [now section 22] , an employee "shall be paid for each hour worked in excess of forty-four hours". Therefore, it is not the number of hours which an employee spends at the company situs but the number of hours which he works at that situs which determines any

> calculation of hours in excess of 44 in any work week. Since the basis of the calculation by the employment standards officer were the figures submitted by the employees, which included one hour lunch breaks, those calculations must be reduced by one hour each day in order to accurately reflect the total number worked.

28. *1166709 Ontario Inc. (c.o.b. Acura 2000)*, [1998] O.E.S.A.D. No. 15, January 6, 1998, also involved an order for overtime pay. The employer asserted the employee's hours of work amounted to 44 (51 hours less 7 hours in unpaid meal breaks). The employee asserted he worked 51 hours and was therefore entitled to overtime. The employee was on call during the entire period with only "a brief time to eat a sandwich". The Board determined that the employee was not provided a proper eating period. The order of the Employment Standards Officer requiring the employer to pay overtime was upheld.

29. In *1309325 Ontario Ltd. (c.o.b. Active Green & Ross)*, [2002] O.E.S.A.D. No. 162, February 26, 2002, the Board deducted meal periods from the total sum of work hours for the purposes of calculating overtime. Interpreting section 12(2) of *O. Reg. 325*, passed pursuant to a predecessor of the Act, the Board stated at page 14: "pursuant to the legislative scheme, the claimant is deemed to have been performing work for all the hours (excluding lunch breaks) that he attended at the workplace."

30. In *Ontario Guard Services Inc. and United Food & Commercial Workers, Local 206 (Hole Grievance)*, [1999] O.L.A.A. No. 206, a rights arbitration, the arbitrator considered the calculation of overtime pay in the context of a collective agreement. The arbitrator accepted generally that, under the statute as it then existed, paid eating periods are excluded from the calculation of hours worked for the purposes of computing overtime. However, the arbitrator determined that the intention of the parties to the collective agreement was that the phrase "hours worked" in the collective agreement was not intended to refer to the existing employment standards legislation, and was intended to include paid meal breaks. Accordingly, meal periods were included in the calculation of hours worked for the purposes of computing overtime.

31. On the face of her offer of employment, Ms. Yasin was entitled to a half-hour meal period. When she worked at the Consulate, from August until November 4, 2004, she was on her own, largely unsupervised. Other than her assertion that she often had to work after the Consulate's windows closed, there was no evidence that Ms. Yasin was entirely precluded from taking her meal period at some point during her work day. I therefore find that, in the period when Ms. Yasin was assigned at the Consulate, she had an opportunity to take her allotted half-hour meal period.

32. I think it most probable that, when Ms. Yasin was re-assigned to the TCS office in early November 2004, she had to attend to the walk-in customers during her lunch periods. Mr. Raval said he routinely observed Ms. Yasin taking lunch in a TCS lunch area. He also testified with respect to his understanding as to how rotating lunch periods were arranged for Ms. Yasin and the other CSR's. Ms. Yasin had a different version of events. Her supervisor and manager were not called to give evidence. As between Mr. Raval and Ms. Yasin, the latter was in the best position to know the details concerning serving walk-in customers during meal periods. I therefore accept Ms. Yasin's testimony concerning her meal periods while employed at the TCS

office. I find that, when she was transferred to the applicant's office in November 2004, she did not have the opportunity to take an uninterrupted meal period because of the demands caused by walk-in customers.

33. Based upon Exhibit 9, I calculate that Ms. Yasin worked a total of 188 days for TCS. Fifty-six of those days were worked at the Consulate, 132 at the TCS office. Exhibit 9 shows a total of 89.8 hours of overtime. Approximately 50 of those overtime hours are applicable to the period when Ms. Yasin was employed at the Consulate for the first 56 days of work. I have found that, during that period, Ms. Yasin was entitled to, and had the opportunity, to take a lunch period (a total of 26 non-working hours). The overtime of 50 hours should be reduced by the 26 non-working hours. She is therefore entitled to 24 hours of overtime pay in that period. Ms. Yasin worked approximately 40 hours overtime in the period from early November 2004 until her termination. Since I have found that she was not receiving uninterrupted thirty-minute lunch breaks in that period, she is entitled to overtime pay for the full 40 hours of work. That brings the total overtime to 64 hours. The payroll evidence tendered by the applicant showed that Ms. Yasin was paid for 15.5 hours overtime while employed by TCS. Therefore, her entitlement is reduced by that amount, to 49.5 overtime hours.

34. Of the total of 49.5 overtime hours, 24 are to be calculated at 1.5 times her hourly rate based on her then prevailing salary of $1800 per month (24 hours x $14.16 = $339.84), and the remaining 25.5 hours at 1.5 times her hourly rate based upon her increased monthly salary of $2200 (25.5 hours x $17.69 per hour = $451.10).

35. Ms. Yasin is owed $790.94 in overtime, plus 4 per cent vacation pay ($31.64), for a total of $822.58.

Disposition

36. The Director of Employment Standards is directed to disburse to Ms. Yasin $822.58 from the monies held in trust. The administrative fee is reduced to $100.00. The remainder of the monies held in trust are to be disbursed to TCS.

2831-05-G International Union of Elevator Constructors, Local 50, Applicant v. **ThyssenKrupp Elevator (Canada) Limited**, Responding Party.

Discharge – Construction Industry Grievance – Practice and Procedure – The applicant grieved the discharge of two employees who were fired for allegedly smoking marijuana during their lunch break – The respondent sought to admit videotape surveillance it alleged depicted the grievors smoking marijuana in their truck located offsite of the employer's property – The applicant opposed the admission of the videotape on the basis that it violated the grievors' right to privacy and because the videotape was not produced in a timely manner – The Board considered two lines of arbitral authority on the admission of videotape surveillance: admission where the surveillance is relevant and admission where the surveillance is not conducted unreasonably or for an unreasonable purpose – The

Board adopted the reasonableness test and found the surveillance was unreasonable for lack of sufficient motivation – A "feeling" that something is not right is no substitute for clear and reasonable grounds when employees are off duty and away from the worksite – The respondent had a less intrusive alternative to surveillance because it had an opportunity to observe the grievors' work performance but failed to observe such performance – Finally, there was a reasonable expectation of privacy because the grievors were in their own vehicle – On the issue of delay of production, the Board held it was open to counsel to obtain a production order – Matter continues

BEFORE: *Norm Jesin*, Vice-Chair.

APPEARANCES: *B. Chercover, B. McIntyre, Blaine Thurston* and *Mike Chevalier* appearing for the applicant; *David Cowling* and *Joseph Kerr* appearing for the responding party.

DECISION OF THE BOARD: May 12, 2006

1. This is a referral of a grievance pursuant to s. 133 of the *Labour Relations Act, 1995*, S. O. 1995, c.1, as amended (the "Act").

2. The responding party is an elevator construction contractor. The grievors, Mike Chevalier and Blaine Thurston were employed by the responding party on a construction site in Toronto until they were discharged. The applicant alleges that the grievors were discharged from their employment contrary to the collective agreement binding on the parties.

3. The allegation on which the discharge was based was that the grievors were smoking marijuana during their lunch hour on November 8, 2005. The grievors do not admit that they smoked marijuana as alleged.

4. The responding party seeks to substantiate its allegation in two ways. First it seeks to introduce a video purporting to show the grievors smoking marijuana in Mr. Thurston's pick-up truck on the date in question. The video was taken by Matthew MacArthur, the construction manager of the responding party. In addition, Mr. MacArthur is able to give first hand evidence to substantiate the responding party's video. The applicant objects to the admission of the video into evidence but does not oppose the admission of Mr. MacArthur's first hand observations.

5. The applicant objected to the introduction of the video on two grounds. First, the applicant asserts the grievors are entitled to a right of privacy under their (or any) collective agreement. According to the applicant, any video surveillance violates that right of privacy unless it is conducted for a reasonable purpose and unless it is conducted reasonably. The applicant submits that these requirements were not met and that the video should therefore be excluded as evidence.

6. The applicant further submits that I should refuse to admit the video as a consequence of the responding party's failure to provide the video in a timely manner, notwithstanding an undertaking to do so by counsel for the responding party.

7. At the hearings the parties presented evidence and argument with respect to these preliminary matters.

8. Matthew MacArthur gave evidence for the responding party. He testified that the responding party's supervisor on the job, Wayne Wagner, informed him that the grievors had been behaving oddly during the course of the job. For instance, Mr. Wagner noticed that the grievors were taking their lunch in Mr. Thurston's truck rather than in the lunch trailer provided on the site. In addition, Mr. Wagner noticed that Mr. Chevalier had failed to follow unspecified safety procedures on a couple of occasions. Mr. Wagner did not give direct evidence to elaborate on these matters.

9. Mr. MacArthur further testified that he himself witnessed Mr. Chevalier on one occasion on an elevator without a safety harness, without safety glasses and with his safety hard hat on backwards. When Mr. MacArthur approached Mr. Chevalier about these matters, Mr. Chevalier did not seem concerned. According to Mr. MacArthur, Mr. Chevalier had a dazed look and gave little response. Nevertheless, Mr. Chevalier did put on his safety equipment and did turn his hat in the right direction.

10. As a result of the "odd" behaviour described above Mr. MacArthur decided to conduct video surveillance of the grievors while they were in their pick-up truck. The truck was parked in the same public lot near the job site every day that the grievors were at the job. On November 8, Mr. Wagner obtained a van from a friend. The van had tinted windows so that anyone sitting in the back of the van could not be seen from the outside. Mr. MacArthur and Mr. Wagner parked the van "kitty corner" to the pick-up truck so that the right rear of the van was adjacent to the left front of the truck. Mr. MacArthur and Mr. Wagner then conducted their surveillance from the back of the van.

11. At lunch Mr. MacArthur says that he saw the grievors smoke marijuana and began to record what he saw on a DVD recorder. It is that DVD that the responding party seeks to introduce into evidence.

12. Bernard McIntyre gave evidence for the applicant. He was a business representative of the applicant at the time of the events in question.

13. Mr. McIntyre has more than twenty years' experience in the elevator trade. He testified that it is not unusual at all for employees not to be wearing their safety harness or their safety glasses while on an elevator. Indeed, he stated that in some circumstances it might be dangerous to wear a harness on an elevator. He further testified that it was common, especially among ironworkers and other young construction workers, to wear their hard hats backwards. In essence, he testified that there was nothing odd about the grievors' behaviour as described by Mr. MacArthur.

14. The parties provided me with a number of arbitral authorities concerning the admissibility of evidence obtained through video surveillance. Those cases fall into two main categories. In the first line of cases arbitrators have taken the view that if the evidence is relevant then it should be admitted. Cases standing for that view include *Kimberly-Clark Inc.* 66 L.A.C. (4th) 266, (Bendel), *Toronto Transit Commission*, 79 L.A.C. (4th) 85 (Solomatenko) and *Canadian Timken Ltd.*, 98 L.A.C. (4th) 129 (Welling). Indeed in *Kimberly-Clark Inc.*, arbitrator Bendel states at p. 79 that "relevance is the most important criteria in determining admissibility in arbitration proceedings."

15. The other view is that video surveillance may be inadmissible in evidence if it was conducted unreasonably or for an unreasonable purpose. This view originates with the proposition, first articulated among British Columbia arbitrators that there is a right to privacy in the employment relationship either under the Charter or by statute. The theory is that as video surveillance may violate that right to privacy, the evidence ought to be excluded. Arbitrators adhering to the relevance test as described above clearly and emphatically reject that view.

16. Outside British Columbia, some arbitrators have taken the view that employees do indeed have a right of privacy in their employment relationship either in common law or implicitly under the collective agreement. (See for example *Toronto Transit Commission*, 95 L.A.C (4th) 402 (Chapman), *Securicor Cash Services*, 125 L.A.C (4th) 129 (Canada)(Whitaker)). These arbitrators note that the arbitral jurisprudence has long recognized a right of privacy that would prevent employers from conducting unreasonable drug testing or searches of employees. In their view, this same right of privacy would prevent employers from conducting unreasonable surveillance of their employees, particularly while those employees were off duty.

17. While noting that the right of privacy stems from common law, arbitrator Whitaker in *Securicor Cash Services* also describes how the right specifically arises from the collective agreement in the following terms at pp. 138-9:

> The theory then is that it is part of management's residual rights under the collective agreement to undertake investigations that might impinge on the privacy of employees if such investigations are reasonable in the circumstances. In this way it can be said that the test of reasonableness arises from the collective agreement itself. The test of reasonableness is an implicit term of the agreement. The other side of the implicit term however is that unreasonable investigations that trench on the privacy of employees are contrary to the collective agreement.
>
> Arbitrators Welling and Solomatenko do not agree that employee searches, drug tests and the like are similar in nature to surveillance evidence. Arbitrator Solomatenko notes at p. 105 of his award:
>
> Again, I fail to see the analogy. Physically searching someone or their personal effects simply cannot be equated with the "technique" of observing someone.
>
> With respect, I disagree. In my view, employee surveillance depending on the circumstances, can be understood to be an intrusive inquiry into the private realm of the employee, just as much as a physical search, a drug or alcohol test, a medical exam or the search of a locker or coverall pockets. Whether it is a drug test or surveillance, the employer is conducting an investigation for the purposes of obtaining information that it believes is necessary to run its business.

> The type of information being sought is usually not of any concern to the employer in the normal course of business and is understood generally to be within the realm of the employee's private life. Absent a special or unusual concern (for example a suspicion of theft or sick leave abuse), an employer would not be interested in what an employee carries in his or her pockets, whether they are in good health or what they might be doing when standing in front of their home when not at work. In the normal course, this type of information would be understood to be part of the sphere of the employee's private life and of no legitimate interest to an employer.
>
> For these reasons, the same type of analysis which applies to searches or medical examinations should apply to the issue of surveillance -- which is that a collective agreement should be read to include an implicit term that such intrusive inquiries are only permitted if reasonable in the circumstances. In other words, the exercise of management's rights to undertake inquiries that intrude into the sphere of what would in the normal course be considered to be an employee's private affairs, are constrained to only those inquiries which are reasonable.

18. It is important to point out that *Securicor Cash Services* was determined under federal jurisdiction and subject to the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5 (PIPEDA). However, the finding of a right to privacy under a collective agreement appears to be independent of any rights under PIPEDA.

19. I agree with arbitrator Whitaker that a protection against unreasonable surveillance is a restriction that is reasonably inferred in the exercise of management rights under the collective agreement. I also agree with arbitrators such as Chapman and Whitaker that video evidence that is obtained in violation of that protection may be excluded in accordance with the arbitrator's discretion under s. 48(12) of the Act (or in *Securicor Cash Services*, in accordance with a similar discretion conferred by ss. 60(1)(a) and 16(c) of the *Canada Labour Code*.) In that regard even arbitrator Bendel notes in *Kimberly-Clark Inc.* at p. 277 that relevant evidence may be excluded "if it was obtained in violation of the [collective] agreement."

20. As noted in *Securicor Cash Services*, there are a number of factors that arbitrators have considered in determining whether the conduct of video surveillance was reasonable and in accordance with the collective agreement. Those factors include the following:

> What was the reason or motivation for the surveillance?
> Was there a less intrusive alternative to the surveillance?
> Was the surveillance conducted in a location where the
> employee has a legitimate expectation of privacy?

Motivation for the Surveillance

21. In this case I do not find that the reasons for conducting the surveillance are particularly compelling. Although the responding party described the behaviour of the grievors on the job site as odd, there is nothing very odd about the specific behaviours that were described – whether those behaviours pertained to the wearing of the hard hat backwards or the failure to wear safety belts and glasses in certain circumstances. The responding party should certainly not have made much of the fact that the grievors chose to take their lunch in a different location than the trailer, something they were clearly entitled to do.

22. A "feeling" on the part of management that something is not right should not provide a license to conduct surreptitious surveillance of employees while they are off duty and away from the work site. An employer may certainly observe an employee at work and may pay particular attention to whether that employee is performing his job properly and safely. If the employer observes a real problem in job performance, the employer may respond appropriately. However off duty surveillance of an employee should not be conducted without clear and reasonable grounds.

23. In cases where video evidence has been admitted, clear grounds for suspicion of the employees conduct usually exist. For example in *Securicor Cash Services* the grievor was absent due to illness for two consecutive shifts after he was told he was a witness in a theft investigation. An immediate investigation was necessary as there was a fear that the grievor might flee or remove evidence of the theft.

24. In *City of Toronto*, 104 L.A.C. (4th) 193 (Herman) the arbitrator found at p. 205 that the employer had reasonable grounds to suspect that the grievor was feigning injury and therefore the decision to conduct surveillance was a reasonable one.

25. In this case I do not think that such reasonable grounds for surveillance have been established. This is a factor which therefore favours the applicant's objection.

Were There Reasonable Alternatives to Surveillance?

26. Where the employer can establish a reasonable motivation for the surveillance it may not be appropriate for an arbitrator to strictly assess the alternatives available. That is certainly the case where the employer minimizes the obtrusiveness of the surveillance by observing the activities of an employee only in public. In this case, however, it is appropriate to point out that the employer had every opportunity to observe the work performance of the grievors to see whether that performance of the work was being carried out properly and safely (as opposed to observing how their hard hat was being worn or whether their safety glasses were constantly being worn even when they were not performing a task that required them to be worn). Again, this factor therefore favours the applicant's objection.

Was There a Legitimate Expectation of Privacy?

27. This factor has been the subject of much discussion in recent cases. In *Toronto Transit Commission*, 88 L.A.C. (4th) 109 (Shime), the arbitrator stated as follows at p. 118:

> Surveillance in a public place, even if it is an invasion of privacy, but where a person does not subjectively have a

> reasonable expectation of privacy, or where there is not an objectively reasonable expectation of privacy, does not rank high on the scale of privacy issues.

28. In *City of Toronto*, the arbitrator admitted video surveillance of an employee's activities in public to determine if the employee was misrepresenting the degree of his injury. At p. 206 the arbitrator noted that when an employee was in his or her house or in another's house "privacy from observation is to be expected." The same expectation did not exist when one was in the public domain.

29. In *Securicor Cash Services*, arbitrator Whitaker states at p. 142 that whether the surveillance is conducted in public is not determinative of its admissibility. However, he concludes that it is a factor to be taken into account in determining the reasonableness of the surveillance and whether it was conducted in accordance with the collective agreement.

30. Although surveillance of the grievors in this case was conducted while they were in a public parking lot they were in their own car and were seen only through tinted windows in the neighbouring van. Although they would not have the same expectation of privacy they would have in their own home, there would have been a greater expectation of privacy than if they were walking in a public side walk where they could more easily be seen. In my view the facts pertaining to this factor are somewhat neutral and do not favour a conclusion that the surveillance was reasonable.

Conclusion

31. In all the circumstances described above I have concluded that the surveillance was not reasonably conducted and was therefore conducted in violation of the collective agreement. It is therefore my determination that the applicant's objection is a valid one and that the video should be excluded at this time. However, as noted above, the responding party has indicated that it intends to call Mr. MacArthur to give testimony about his observation of the grievors. It may be that the video may become necessary to either corroborate or challenge that or other evidence that is called regarding the allegations that are the subject of the termination of the grievors. I will therefore reserve the right to entertain a motion to view the video if either party seeks to introduce it at a later time for such purposes.

32. Finally I would add that I would not have excluded the video because of the failure of counsel for the responding party to produce a copy of the video to counsel for the applicant in a timely manner. It is preferable in my view to deal with such delay by requesting an order for production. If such order is violated in a way that prejudices the other party, exclusion of evidence may then become appropriate. No such prejudice exists in this case.

0618-06-U The Toronto Transit Commission, Applicant v. Amalgamated Transit Union, Local 113, Mike Smith and others named in the application, Responding Parties.

Practice and Procedure – Strike – The TTC brought an application for a declaration that its employees were about to engage in an illegal strike at the start-up of the morning shift – The Board provided notice to the union and counsel who normally acted for the union of a 5:30 a.m. hearing by conference call to deal with the application, leaving telephone messages and sending a facsimile to the union's office – The Board held that the union had been served with the application and had received notice of the hearing – The Board ordered the employees to cease and desist from any further engagement in the unlawful strike

BEFORE: *Kevin Whitaker*, Chair.

DECISION OF THE BOARD; May 29, 2006

1. This is an application filed by the TTC for a declaration and direction concerning an unlawful strike, pursuant to section 100 of the *Labour Relations Act* (the "Act"). The application was filed with me personally by counsel for the TTC on the morning of May 29, 2006 at approximately 4:30 a.m. The application has yet to be assigned a Board File number.

2. The applicant alleges that the ATU Local 113 is currently engaged in an unlawful strike with the consequence that the TTC is not able to provide public transit this morning, May 29, 2006.

3. Immediately upon receipt of the application, I attempted to contact the President of the ATU, the Vice-President of the ATU and counsel who normally act for the ATU in matters before the Board. Being unsuccessful in speaking to these officers or counsel over the telephone, I left telephone messages advising them that a hearing by conference call was scheduled for 5:30 a.m. today, May 29, 2006, providing them with a call-in number, to deal with the application. Further, I sent a notice of such hearing by conference call to the ATU by facsimile.

4. I find on the material filed that the ATU has been served with both the application and has notice of the hearing by conference call scheduled to deal with the application.

5. The TTC participated in the hearing by conference call. No one participated on behalf of the ATU.

6. In addition to the material filed, the TTC confirmed in the hearing that picket lines consisting of ATU members were operating at all nine TTC Divisions and that employees were either being prevented from reporting to work or were choosing not to cross picket lines. The consequence is that public transit is not operating in the City of Toronto- for example, only seven buses are on the road where normally there would be 1300 buses providing transit service. There are similar consequences for the subway and street car operations.

7. The parties are currently covered by a collective agreement which is effective until March 31, 2008.

Declaration

8. In the circumstances, the Board finds and declares that the ATU is engaged in an unlawful strike contrary to the provisions of section 100 of the Act.

Order

9. The Board Orders and Directs the employees of the TTC to immediately cease and desist from any further engagement in an unlawful strike. Officers, officials and agents of the ATU shall cease and desist from procuring, supporting or encouraging an unlawful strike. Employees shall perform their assigned duties and shall not restrain or prevent any other employee from reporting to work.

10. The parties are directed to post a copy of this decision immediately in the workplace where it is likely to come to the attention of employees.

11. The Board remains seized to deal with any further issues arising from this application or the implementation of the Board's Orders and Directions.

0618-06-U; 0620-06-U The Toronto Transit Commission, Applicant v. Amalgamated Transit Union, Local 113, Mike Smith and Others Named in the Application, Responding Parties.

Lock-Out – Strike – Reconsideration – The ATU alleged the TTC had illegally locked out its employees, and also sought reconsideration of the earlier cease and desist order (the Whitaker decision) – The Board held that no lock-out was taking place, and stated that the parties could have had their differences considered through the grievance and arbitration process – The Board also found that the illegal strike was continuing – The Board stated that even if it were to find that the union had not received notice of the earlier hearing, it was not appropriate to vary the Board's order – The union had full opportunity to make the submissions it would have been able to make earlier - Lock-out application dismissed; reconsideration of strike application denied

BEFORE: *Brian McLean*, Vice-Chair.

APPEARANCES: *Heather Alden, Simon Blackstone, Bob Kinnear* and *Frank Gamaldi* for the applicant; *Michael J. Kennedy, Simon Mortimer* and *Scott Blakey* for the responding parties

DECISION OF THE BOARD; May 29, 2006

1. The Amalgamated Transit Union, Local 113 ("ATU, Local 113") has filed an application alleging an unlawful lock-out by The Toronto Transit Commission ("TTC"). It also requests reconsideration of the decision of the Board of today's date with respect to Board File No. 0618-06-U (the "return to work order").

2. The Board heard from the parties today in accordance with oral notice given by the Chair of the Board to counsel for the respective parties.

Lock-Out Application

3. The Board dismisses the union's application in Board File No. 0620-06-U that the TTC is engaged in a legal lock-out.

4. The ATU, Local 113 argues that the TTC has engaged in an unlawful lock-out by unilaterally, and contrary to the collective agreement (and other agreements made during bargaining), changing employees' work schedules and preventing them from working their old work schedule. In the union's view, the TTC has compounded the problem and locked out by relieving drivers of their duties who refuse to comply with the new work schedule.

5. There is no doubt that either party could have had this matter considered prior to today through the grievance and arbitration procedure. The fact that neither chose not to do so is regrettable. However, that fact does not create a lock-out.

6. In this case employees have responded to management action by engaging in a strike which, given that there is a collective agreement in place, is untimely and unlawful. That fact is clear from the materials before me, even based on those filed by the union.

7. The union and its members are familiar with the "work now – grieve later principle". It is a corner stone of labour relations in this province. If the employer is acting contrary to the collective agreement, the appropriate response is to file a grievance and take the matter to arbitration, not to engage in a strike.

8. I remind persons affected by the Board's return to work order that there are serious consequences for failing to abide by such orders.

Request for Reconsideration

9. The request for reconsideration is based on an allegation that the union did not receive notice of the hearing which resulted in the Board's decision in Board File No. 0618-06-U. The Board's practice on a request for reconsideration is set out succinctly in *Sack Mitchell Price* Ontario Labour Relations Board Law and Practice as follows:

> Although the jurisdiction of the Board under s. 1124(1) to reconsider a decision is probably wider than the jurisdiction of a court to order a new trial, and the Board is not bound by the rules laid down by the courts, the Board has said that such rules provide a sound set of principles which the Board ought generally to consider as a guide in the exercise of its discretion under s. 114(1).

> Accordingly, the Board will generally not reconsider a decision unless:
>
> 1. a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive, or
>
> 2. a party wishes to make representations or objections not already considered by the Board that it had no opportunity to raise previously.

10. I do not disagree with the conclusion reached in paragraphs 3 and 4 of the return to work order. However, even if I were to find that the union had not received notice of the hearing which led to the order, this would not be an appropriate case to vary the Board's order. I am satisfied that the union and its members are engaging in an illegal strike and that the Board would have come to the same decision had the union been present and had the opportunity to make argument – as it was before me – this morning.

11. Finally, I wish to make it clear that nothing before me suggests that any counsel acted inappropriately in this matter.

Disposition

12. The application in Board File No. 0620-06-U is dismissed.

13. Accordingly, the decision dated May 29, 2006 remains in place. The Board confirms its declaration that the ATU is engaged in an unlawful strike and its order among other things that employees of the TTC are to immediately cease and desist their strike activity and return to work.

0479-06-HS; 0480-06-HS; United Lumber & Building Supplies Co. Ltd., Applicant v. Douglas West, Inspector, Responding Party.

Health and Safety – The applicant employer appealed and sought a suspension of an Order requiring it to provide a readily available hard copy of material safety data sheets (MSDS) to all workers who are potentially at risk of exposure to hazardous materials – In its submissions on the suspension request, the employer argued that the workers have easy access to MSDS through a CD-Rom program and computer system; that it would be too onerous to maintain, regularly update and locate correct MSDS using a hard copy version; and that whatever retrieval problems existed with the computer system had been corrected since the Inspector's visit – An employee member of the Joint Health and Safety Committee filed a response in support of the employer's position, submitting that the current CD-Rom program is more time efficient and accessible for workers than the prospect of searching through the hard copy for MSDS – The Board found that the employer would suffer harm if it was required to comply with the Order pending the appeal; the suspension of the Order

would not endanger worker safety because the company's retrieval system appeared to allow workers to quickly access the correct MSDS; and the applicant had *prima facie* grounds for a successful appeal – Suspension request granted

BEFORE: *Susan Serena*, Vice-Chair.

DECISION OF THE BOARD; May 31, 2006

1. Board File No. 0479-06-HS is an appeal filed by United Lumber & Building Supplies Co. Ltd., ("United Lumber") pursuant to section 61(1) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 as amended (the "Act") of an Order made by Inspector, Douglas West under the Act on April 24, 2006, in Field Visit #5752300. Board File No. 0480-06-HS is an application filed with the Board to suspend the Order in accordance with section 61(7) of the Act pending the Board's determination of the applicant's appeal in Board File No. 0479-0-HS. This decision deals only with the suspension request.

2. The Order under appeal relates to the use by the applicant of a CD Rom and computer for storing and retrieving material safety data sheets ("MSDS"). The Order that is the subject-matter of these applications, reads as follows:

> 1. Pursuant to Section 38-5 of the OHSA/90 the employer shall ensure that a hard copy of every material safety data sheet required by subsection (1) shall be made available by the employer in the workplace in such a manner that it is readily accessible by all workers who may be exposed to the hazardous material to which it relates. At the time of the inspection MSDS sheets were provided only on CD-Rom program which was not readily accessible to the worker. This order to be complied with by June 2, 2006.

3. In support of its request for a suspension of the Order, the applicant indicates that it is required to maintain over 8,000 MSDS sheets that have to be regularly updated as new products become available. The applicant asserts that if the Order is not suspended it would be required to print-out each MSDS it is required to maintain and repeatedly update its MSDS binders each time a new product becomes available. It contends that worker safety is assured because all MSDS are readily available to the workers on the CD-Rom through a computer to which all workers have access and the workers have been trained on the MSDS retrieval process. The applicant also asserts that it is easier and quicker for a worker to retrieve the correct MSDS using the CD-Rom/computer system than would be the case if applicant was required to maintain a hard copy of each MSDS as this would require workers to look through 21 binders (each 4 ½ inches wide) to locate and obtain the correct MSDS rather than simply type the product number into the computer in order to locate the correct MSDS. Finally, the applicant contends that it is more likely than not to succeed on its appeal because the Inspector misquoted section 38(5) of the Act.

4. The Ministry of Labour takes no position with regard to the applicant's request for a suspension of the Order.

5. A worker member of the Joint Health and Safety Committee also filed a response to the application to suspend the Order. Sandy Williams states that when the Inspector visited applicant's premises and sought to retrieve an MSDS from the computer he was dissatisfied when

the MSDS appeared the computer monitor "sideways" and a copy could not be immediately printed because the printer was being used to print another large document. Mr. Williams maintains that both of these problems have been rectified. He also asserts that it is quicker and easier for workers to retrieve the correct MSDS using the CD-Rom and computer system than would be the case if this material was stored in binders using hard copy.

6. Subsection 61(7) of the Act reads as follows:

> 61(7) On an appeal under subsection (1), the Board may suspend the operation of the order appealed from pending the disposition of the appeal.

7. The factors the Board considers in determining whether to suspend the operation of an Inspector's Order are:

> (a) whether the suspension of the order would endanger worker safety;
>
> (b) whether the employer would be severely prejudiced by not suspending the operation of the order; and
>
> (c) whether there is a *prima facie* case for a successful appeal of the order.
>
> (See *R.J. Dungey & Sons Ltd., supra,* at para. 17, and the decisions cited therein).

8. In addition to considering these factors, the Board has shown deference to the Orders of Inspectors. In *General Motors of Canada Ltd.,* (June 2, 1997, 3666-96-HS) Adjudicator Herman observed the following:

> It is important that inspectors, orders that are reasonably and properly made not be lightly overturned pending an appeal. The statutory scheme establishes the inspector as the decision-maker of the first instance, and the purposes of the Act are best served if his or her decisions prevail, in the absence of a persuasive reason otherwise, and pending the full application for review.

9. Having carefully considered the application and applying the factors, the Board considers in determining whether to suspend the operation of an Inspector's Order to the circumstances of this appeal, the Board is persuaded that it should grant the suspension requested. In this case, the Board is satisfied that the applicant will suffer harm of the nature required in order to compel the Board to suspend the operation of the Order if it is required to comply with the Orders in advance of the hearing of this appeal.

10. The Board is also satisfied that suspension of the Order would not endanger worker safety as it appears that workers are able to retrieve the correct MSDS in a timely manner using

the CD-Rom and computer system and that the retrieval system have been modified to address the problems that occurred during the Inspector's visit.

11. The applicant has also established a *prima facie* case for a successful appeal of these Orders given that the Inspector misquoted section 38(5) in the text of the Order under appeal. Although it is impossible for the Board to determine the merits of the appeal without the benefit of evidence and legal argument to support the respective positions of the parties to the appeal, based on the information contained in the application, I am satisfied that it is more likely than not that the applicant will be successful in its appeal.

Disposition

12. Having regard to the material filed by the parties, the Board is satisfied that it should exercise its discretion under section 61(7) of the Act and suspend the operation of Order No. 1 made April 24, 2006 in Field Visit No. 5752300 by Inspector, Douglas West pending the outcome of the appeal. Accordingly, the application in Board File No. 0480-06-HS is granted.

13. Board File No. 0479-06-HS is referred to the Registrar to schedule the hearing. I am not seized with this matter.

3215-05-R Association des employé(e)s de l'Université d'Ottawa [AEUO], Applicant v. **Université d'Ottawa**, Responding Party.

Certification – Employer Support – Representation Vote – Trade Union – In this application for certification the Board considered whether section 15 of the Act was contravened, that is whether the employer provided financial or other support to the applicant – The Board concluded that the Association was precluded from becoming certified for the following reasons: the Association's sole source of start-up and ongoing operating funding was the employer; no dues deductions were authorized; it was not relevant whether the funding was provided directly or indirectly by the employer as it was still financial support; the employer provided free office space, a significant amount of relief time, and paid for all arbitration proceedings; and the Association's membership was limited to non-union employees holding permanent positions thus giving management control of membership through its hiring decisions – All of this amounted to improper employer support – Application dismissed

BEFORE: *Mary Anne McKellar*, Vice-Chair.

DECISION OF THE BOARD: June 5, 2006

Introduction

1. This is a certification application. As I noted in my decision dated February 16, 2006, there are a number of outstanding issues between the parties. Two of those issues are threshold

issues. They are: (1) is the applicant a trade union; and (2) does section 15 of the *Labour Relations Act, 1995* ("the Act") preclude the applicant from being certified. The parties agreed to file written submissions on these issues, and they have done so.

Decision

2. I have determined that the applicant is precluded from being certified pursuant to section 15 of the Act. That is a sufficient basis on which to dismiss this application. There is no purpose to determining any of the other outstanding issues, and I decline to do so. In the balance of this decision, I refer to the applicant as though it had been found by me to have trade union status. I do so merely for the purpose of making these reasons easier to read. For clarity, the applicant remains an association which the Board has not yet found to be a trade union.

Applicable Principles

3. Section 15 of the Act reads as follows:

> **15.** .... The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.

4. This section aims to preclude the conflict of interest that might arise where a trade union does not owe its allegiance exclusively to those whom it seeks to represent. A classic iteration of this principle is found in the following passage from *Tri-Canada Inc.*, [1981] OLRB Rep. Oct. 1509:

> The bargaining process between employers and employees always implies, in addition to their common interest, some degree of conflict between the immediate economic interests of the bargainers – the payer and the receiver of wages. This conflict of interest will necessarily co-exist with their common interest in the welfare of the enterprise from which they both devive their income; and we do not mean to suggest that harmonious relations do not exist between employers and trade unions. But short-run conflicts of economic interest are inevitable, and if they are to be resolved through the process of collective bargaining, it is highly inappropriate for the agency which represents one party to the bargain, to be in any measure under the influence of the other. Collective bargaining by its very nature requires an arm's length relationship between the bargaining parties, and there are a number of statutory provisions designed to ensure that this is the case.

5. In determining whether section 15 is applicable in respect of a trade union seeking to be certified, the question before the Board is whether an employer has provided financial or other support to it. The question is NOT whether employees favour representation by that trade union. To state the obvious, if employees did not favour representation by the union then it would not be certifiable for that reason. Nevertheless, it is true that the issue of section 15 applicability most often arises where rival trade unions and/or employee associations are seeking to organize employees. Consequently, many of the Board's decisions dealing with this issue have expressed concern about the difficulty of concluding that employees who have chosen representation by an employer-supported union or association can be considered to have freely made that choice. Regardless of whether an employee is expressing a preference for one union over another or expressing a preference about whether to be represented by a union at all, the Board may have concerns about the extent to which the employee's decision was influenced by the fact of the employer having supported the union. In other words, contrary to the suggestion by the AEUO, the concern about employee free choice does not arise only in circumstances where there are two competing unions. This is evidenced by the fact that section 15 has been applied even where only one trade union was on the scene.

6. The Board assesses all the circumstances to determine whether certification is precluded by section 15 of the Act. A number of arrangements between a union and an employer that might legitimately be negotiated by parties to a mature arms-length relationship have been found to constitute improper employer support where those arrangements were reached prior to the union's certification (or voluntary recognition) and prior to the conclusion of a collective agreement. Here are some examples:

(a) the furnishing of office space and/or supplies, and permitting the free movement of representatives of the trade union or association throughout the workplace (*Primo Importing and Distributing Co. Ltd.*, [1982] OLRB Rep. Dec. 1869, at ¶¶32 and 33; and *Ontario Hydro*, [1989] OLRB Rep. Feb. 185);

(b) the provision of information that is of assistance in organizing, such as employee lists etc. (*Tri-Canada Inc.*, at ¶17);

(c) the direct provision of financial support, whether described as dues or not, where it is not provided pursuant to a collective agreement (*Jen-Ry Utility Contracting Company Limited*, [1985] OLRB Rep. Aug 1243; and *Corporation of the City of Waterloo and City of Waterloo Staff Association*, [2000] OLRB Feb. 28);

(d) the provision of release time to representatives of the trade union or association;

(e) an arrangement whereby employees automatically become members of the trade union/employee association (*Corporation of the City of Waterloo and City of Waterloo Staff Association*);

(f) where the antecedents to the entity seeking to become or purporting to be the bargaining agent are founded in an employer-founded or sponsored association or committee,

> which has not purged itself of that taint (*Corporation of the City of Waterloo and City of Waterloo Staff Association;* and *Primo Importing and Distributing Co. Ltd.*).

Application of Above Principles to these Facts

7. A number of the proscribed arrangements identified in the Board's case law and set out in the preceding paragraph exist in this case. It will be sufficient to note them briefly.

8. In this case it is undisputed, as I set out in my March 2, 2006 decision, that the applicant's sole source of start-up and ongoing operating funding is the employer. The amount is fixed annually and does not vary with the number of employees, their rates of pay, or their hours of work. No amounts are deducted from employees' wages for this purpose. The Memorandum of Agreement between the applicant and the University provides for dues deductions where employees so authorize in writing, but no such deductions have been authorized. While the applicant appears to suggest that the funding should be considered as coming from employees' wages because it is paid by the University out of the general salary fund, that conclusion is not only not warranted by the documentation, but does not assist the applicant in any event. Regardless of whether the University funds the applicant directly or whether it provides it with funds that have their indirect source in employees' wages, pursuant to the Board's case law referred to above, this situation is construed as the employer's provision of financial support to the union.

9. In addition to funding the applicant's start-up and ongoing operations, the University also provides it with free office space, a significant amount of relief time, and pays for all arbitration proceedings.

10. Finally, the terms of the applicant's constitution are such that "the members of the Association are the non-union employees of the University who hold permanent positions". What this means is that the University effectively controls the applicant's membership through its hiring decisions. Once again, this occurs despite the fact that the applicant is not certified, there is no collective agreement setting out terms and conditions of employment, and, specifically, there is no negotiated union security clause. Section 51 of the Act is quite clear that union security provisions may be included in collective agreements, even though they might otherwise contravene the Act. Even so, the Act places constraints on the type of security provisions that may be negotiated, proscribes closed-shop clauses except in specified circumstances, and provides a mechanism whereby religious objectors may be exempted from otherwise compulsory membership in a union. The absence of any of those checks and the University's agreement that all employees are members of the applicant is a powerful form of employer support.

11. In my view, the most instructive of the Board's cases on this subject is one that the parties did not refer to: *Corporation of the City of Waterloo and City of Waterloo Staff Association*, [2000] OLRB Rep. Jan./Feb. 28. This case involved an application by an established trade union, the Office and Professional Employees International Union ("OPEIU"), to be declared the successor trade union to a staff association. It is not a case about a contest between two unions. The Board found that the staff association had trade union status, but it that it held no bargaining rights that could pass to OPEIU. At least part of the basis of this conclusion was that the employer had created and supported the staff association and then entered into a

voluntary recognition agreement with it whereby all employees were required to become members and dues were deducted. Here is what the Board said about these matters:

> 25. Indeed, the permissive provisions of section 51 which allow an employer and a trade union in its capacity as bargaining agent to include collective agreement provisions setting up a "closed shop" and the mandatory collection of dues; access by the trade union to the workplace and use of the employer's facilities *"despite anything in this Act"* clearly signal that in other circumstances, these activities would be improper demonstrations of employer support [see *J. Paiva Foods Ltd.* [1985] OLRB May 690].
>
> 26. Applying those principles to this case, the Board concludes that while the Staff Association maintains all the paper trappings that would lead to a determination that it meets the definition of "trade union" under the Act, it cannot be found to be a bargaining agent.
>
> 27. The organization's long history provides a compelling picture of its relationship with the City. First, the Staff Association's formation and administration is riddled with employer support, with the result that it could not be found to be a bargaining agent. And second, the Staff Association has not behaved in a manner that is consistent with being the exclusive bargaining agent of the employees.
>
> 28. The most serious manifestation of employer support has existed since the Staff Association's inception and continues today. The City *requires* that all employees in certain classifications belong to the Staff Association. Employees are not free to join or refrain from joining; their *employer* requires them to belong to the Staff Association. It is difficult to think of a more blatant form of employer involvement in the formation and administration; effectively the employer "signs up" the members. Section 51(4) of the Act permits an employer and a bargaining agent to negotiate a collective agreement with a "closed shop" arrangement, *only* where the trade union has established that that at the time it entered into the collective agreement, 55% of the employees were its members, it had already been bound to a collective agreement for a year or it was certified by the Board. A "closed shop" in other circumstances is prohibited and an indicator of improper employer support. In the case before me, there is no illusion that employees freely choose whether or not to join the Staff Association.
>
> 29. The City's support of the Staff Association is extended to the financial by the mandatory deduction of "dues" which are then remitted to the Staff Association. In case more evidence of the extent of the City's involvement in the Staff Association were necessary, the City determines which employees are managerial, and therefore excluded, from the Staff Association, and allows use of its E-mail system, meeting rooms and work time for the Staff Association. All of those are impermissible activities.

> 30. Counsel for OPEIU argued that the signing of the voluntary recognition agreement effectively "washed away" any taint because there is no question that at that time the Staff Association represented the members. But that does not resolve the problem that the Staff Association existed because the employer created and supported it. Again, the evidence does not support a finding that the *employees* chose to be represented by the Staff Association either at the time of the signing of the voluntary recognition agreement or after. That taint cannot be cured. The Staff Association cannot become a bargaining agent.
>
> 31. Having regard to the evidence in its totality, I am persuaded that the signing of the voluntary recognition agreement was not the seminal moment that its wording suggests. As counsel for the employer argued, after its signing the parties went on as before. The parties continued to negotiate their limited agreements; the employer dealt unilaterally with employees, and basically operated a "non-union shop". Whatever the words of the voluntary recognition agreement, the parties did not behave as if the Staff Association was the "sole bargaining agent".

12. The reasoning in the above passages is applicable to this case as well. The University's support of the applicant engages section 15 of the Act and precludes the certification of the applicant.

Disposition

13. This application is dismissed.

14. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

15. The responding party is directed to post copies of this decision immediately in conspicuous locations in the workplace where they are likely to come to the attention of the employees affected and to keep them posted for 10 days.

COURT PROCEEDINGS

1271-03-U; 1336-03-M; 1414-03-M (Court File No. 10/2004) Mississaugas of Scugog Island First Nation, Applicant v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 444, Great Blue Heron Gaming Company and OLRB, Respondents

Board decision [2003] OLRB Rep. Nov./Dec. 1035

Superior Court of Justice (Divisional Court), O'Driscoll, Matlow and Jarvis JJ., May 31, 2006.

O'DRISCOLL J.:

I. The Issue

[1] The Chair of the Ontario Labour Relations Board (OLRB), Kevin Whitaker, in his written reasons of November 30, 2004, summarized it this way:

> What This Case Is About
>
> 1. This matter consists of a Ministerial Reference pursuant to section 115 of the *Labour Relations Act*, 1995, S.O. 1995, c. 1, as amended (the "Act"), an unfair labour practice complaint and an application for interim relief. All three applications raise a common issue as to whether or not a Labour Relations Code enacted by the First Nation Intervener, supersedes the provisions of the Act. Such a result is urged upon the Board by the Intervenor and contested by the trade union and both Attorneys General. The employer takes no position.
>
> 4. By decision dared December 12, [2003] with reasons to follow, the Board found the answer to the constitutional question to be "no". Accordingly, the provisions of sections 17, 18, 70 and 96 of the Act apply to the labour relations of the respondent employer and its employees. The employer is obliged to bargain with the applicant union and the Minister has the jurisdiction to appoint a conciliation officer.

II Nature of these Proceedings. Parties and Intervenors

[2] On January 9, 2004, the Applicant, Mississaugas of Scugog Island First Nation (MS IFN), also referred to as the "Band", launched this application for judicial review under s. 2 and s. 61 of the *Judicial Review Procedure Act*, R.S.O. 1990, c. J. 1, seeking an order quashing 9 orders of the OLRB in OLRB files: No. 1271-03-U, No. 1336-03-M and No. 1414-03-M. The impugned orders of the OLRB are:

(a) September 8, 2003, — OLRB's order stating the constitutional question with respect to the three (3) applications before the OLRB pursuant to the provisions of the *Ontario Labour Relations Act*, 1995, S.O. 1995, c. I, Sched. A (LRA 1995):

> Are the provisions of sections 17 [obligation to bargain], 18 [appointment of conciliation officer by Minister], 70 [employer not to interfere with union] and 96 [inquiry of alleged contraventions of the Act] of the *Labour Relations Act*, 1995 of no force and effect with respect to the labour relations of the respondent employer and its employees by reason of:
>
> (1) the enactment of the *Mississaugas of Scugog Island First Nation Labour Relations Code*; and/or
>
> (2) aboriginal or treaty rights of the Mississaugas of Scugog Island First Nation recognized and affirmed in the *Constitution Act*, 1982; and/or
>
> (3) aboriginal or treaty rights of the Mississaugas of Scugog Island First Nation recognized and affirmed in the Indian Act R.S.C. 1985, c. 1-5 as amended: and/or
>
> (4) inherent rights to self government of the Mississaugas of Scugog Island First Nation.

(b) September 17, 2003, — OLRB's decision that it had the jurisdiction to determine the constitutional question.

(c) September 17, 2003, October 9, 2003, November 12, 2003, November 25, 2003, and the December 17, 2003, procedural rulings designed to streamline and expedite the hearing of the constitutional question.

(d) December 12, 2003, — the decision of the OLRB (after hearing submissions on December 8, 2003) that the MSIFN did not have the authority to pass its Labour Relations Code (the Code). OLRB's full reasons for its December 12,2003, decision were released on November 30,2004.

(e) December 24,2003, — after hearing submissions from all affected parties, OLRB refused to reconsider its answer of "no" to the constitutional question

(f) January 6, 2004, — the OLRB expanded on its reasons for refusing to reconsider its December 12, 2003 decision.

[3] On this application for judicial review, counsel for the Applicant, counsel for the Intervenor Attorney General (Canada) (A.G. (Can)), counsel for the Intervenor Attorney General (Ontario) (A.G. (Ont)), and counsel for CAW each filed a factum, books of authorities and made oral submissions.

[4] Counsel for the OLEB filed a factum limited to 2 areas:

(a) a submission that the applicable standard of review is correctness for the OLRB's decision on the constitutional question, and

(b) submitting that the applicable standard of review on the OLRB's procedural rulings/orders is patent unreasonableness.

[5] Counsel for the OLRB also filed a casebook and attended all 4 days of argument but made no submissions before us as to the merits of the application.

[6] Counsel for the Great Blue Heron Gaming Company (GBH) did not file a factum, were in attendance for the 4 days of argument but made no oral submissions. Counsel advised that GBH took no position before the OLRB.

[7] Counsel for A.G. (Can) and counsel for A.G. (Ont) supported the position of the Respondent Union, CAW.

III. Background and Chronology

[8] The Applicant, MSIFN, is a registered Indian Band (the Band) under the Indian Act, R.S.C. 1985, c. 1-5, as amended. [The term "First Nation" is not used or referred to in the Indian Act]. The Band has 173 registered members, of which 40 live on the Band's reserve land (the reserve) located near Port Perry, Ontario, northeast of Toronto. The reserve is subject to the indian Act. The Band is a self described, small, aboriginal community, part of a larger Mississauga tribe or nation, which in turn is a branch of the Ojibway Nation.

[9] The Band's reserve occupies 2 parcels of land covering 322 hectares (795.65 acres) more or less.

[10] On the Band's reserve, the buildings are:

(a) The Great Blue Heron Casino, owned by MSIFN. There is easy, free and unfettered public access to the GBH casino on the MSIFN's reserve and to the reserve itself for aboriginal and non-aboriginal persons. The MSIFN does not check who comes onto the reserve or who attends the casino.

(b) A GBH casino storage facility

(c) A Band community centre

(d) A Band office

(e) A open-air, canopy covered Band meeting place

(f) Some residential housing

[11] The Respondent employer, GBHGC, is a joint venture of 3 corporate entities. Casinos

Austria International Ltd. (CAIL) holds a 72% majority interest in GBHGC. CAIL is a multi-national publicly traded company. In 2002, it had revenues of more than $3 billion. In 2002, GBHGC was in the top three profit makers of CAIL's 100 casinos. CAIL operates casinos in many different countries and on cruise ships. GBHGC earns a substantial management fee by way of profit sharing with the owner of GBH casino. CAIL employs 8,000 employees worldwide.

[12] The MSIFN formed the Baagwating Community Association (Association), a federal non-profit corporation, to take responsibility for the conduct and management of the table game operations at the casino. The Association has 8 directors, all members of MSIFN, 4 being part of the employer's management team. The Association engaged GBHGC to manage and conduct the day-to-day business of the casino. However, the slot machines are operated by GBHGC on behalf of the Ontario Lottery and Gaming Corporation.

[13] The casino offers Las Vegas style gaming including over 50 table games, such as blackjack, 3-card poker, roulette, big 6 wheel and hold 'em poker as well as more than 450 slot machines. The Band receives 5% of the gross revenue from the slot machines. In year one of the slots, 2000-2001, the gross was $57.2 million. The casino also provides beverages and food.

[14] About 1,000 persons work at the casino which operates 24/7. One percent of the GBH casino workers are members of the MSIFN. The only other people working on the reserve are approximately 12 full-time and 3 part-time employees of the Band council.

[15] The Respondent Union, CAW, is Canada's largest private sector trade union with more than 255,000 members.

[16] The GBH casino opened on January 31, 1996. Shortly thereafter, the CAW began its efforts to organize GBHGC employees. The campaign was sporadic from 1997-2001 and intensified in 2002. The GBHGC and the MSIPN made their opposition quite clear to the union's campaign for certification.

[17] In December 2002, CAW made an application to the OLRB for certification. 306 workers voted in favour of union representation and 150 did not.

[18] At no time did the MSIFN intervene in the certification procedure before the OLRB. MSIFN did not advise the OLRB or the parties that it was contemplating the passage of its own labour code. Nor did it allege that OLRB had no jurisdiction or assert aboriginal and/or treaty rights inherent to the MSIFN that would be infringed by certification of CAW by the OLRB.

[19] On January 23, 2003, the OLRB certified CAW as the union for the employees of GBHGC.

[20] Neither GBHGC nor the MSIFN challenged the certification of CAW as the bargaining agent for the employees at GBH casino. Nor was there any application for judicial review asking to quash the certification.

[21] On February 4, 2003, CAW gave GBHGC a "notice to bargain", that is, a notice to bargain a first collective agreement with CAW after the union had been certified by OLRB. Bargaining was delayed pending the approval of CAW as a supplier to the Alcohol and Gaming

Commission of Ontario (AGCO).

[22] On May 29, 2003, CAW was approved as a trade union supplier by AGCO. This approval permitted CAW to deal with GBHGC regarding slot machines and alcohol issues under the *Gaming Control Act*, 1992. The Band Council learned of this approval sometime between May 29, 2003, and June 6, 2003.

IV. The Code

[23] On June 6, 2003, by resolution of the MSIFN Council, MSIFN approved a "Labour Relations Code" (Code), which purports to govern labour relations on the MSIFN reserve, and arguably, labour relations off the reserve that relate to activities involving connected entities that stem from the MSIFN reserve. The Code also has a schedule of fees.

[24] In the transcript of MSIFN's past Chief, Rennie Goose, he states that as far back as November 1999, the MSIFN contemplated drafting the Code (OLRB, Supplementary Record: Vol. 12, p. 2737, Q. 69).

[25] The transcript of evidence of the current Chief, Tracey Gauthier, for December 1, 2003, (Vol. 11, p. 2292) and December 2, 2003, (Vol. 11, p. 2356, 2409, 2410, 2434 and 2436) establishes that the proposed Code was not:

(a) mailed out to MSIFN members,

(b) posted in a public place,

(c) discussed at a public place,

(d) made the subject of a members' vote,

(e) the subject of consultation with MSIFN band elders.

[26] The evidence of Chief Gauthier establishes that the Code was passed at an informal, off the record get-together of Chief Gauthier and two (2) Band councillors. No minutes were kept of the "get-together".

[27] On June 6, 2003, the MSIFN issued a press release which claimed that the Code "regulates the relationship between the employers and trade unions, including union organizing campaigns, certifications as bargaining agent, and collective bargaining processes.

[28] In its reasons, dated November 30, 2004, the OLRB stated:

> 15. On June 6, 2003, by resolution of the First Nation Band Council, the First Nation approved a Labour Relations Code (the "Code"[1]). The Code purports to govern labour relations on the reserve and arguably, to a broader extent, labour relations off the reserve that relate to activities involving commercial entities that stem in different ways from the First Nation.
>
> 16. The Code appears in many respects to be modeled on the

> Canada Labour Code (the "CLC"). The Code contains most of the significant provisions of the CLC and is clearly designed to regulate collective bargaining in the same manner as the CLC or, for that matter, the Act and other provincial labour relations statutes.
>
> 17. The Code establishes a labour relations tribunal known as the Dbaaknigewin. This tribunal exercises powers and a jurisdiction which is analogous to that of the Board under the Act and other labour boards in other Canadian jurisdictions.
>
> 18. There are some special features to the Code which do not appear in the CLC or the Act. For example, there is no right to strike or lock out. Further, a union interested in entering onto the reserve to speak to workers must pay a fee of $3000.00. A worker who wishes to file an unfair labour practice must pay what amounts to a filing fee of $12,000.00. The casino employer in this case is prohibited under the Code from bargaining with a union that is not certified under the Code.
>
> 19. Following the passage of the Code, the employer casino took the position that it could not commence bargaining with the union without running afoul of the Code. The employer in these proceedings has consistently maintained the position that it simply wishes to be told which statutory regime applies to its operations —is it the Code or the Act?

V. The Proceedings before the OLRB

[29] On July 15, 2003, CAW requested that the Minister of Labour (the Minister) appoint a conciliation officer under s. 18 of the LRA 1995.

[30] On July 16, 2003, OBEOC objected to the request alleging that it was unclear whether or not the LRA, 1995 applied.

[31] On July 18, 2003, MSIFN wrote to the Minister stating that the LRA, 1995 did not apply and that the casino's labour relations were governed by MSIFN's Code, passed on June 6,2003.

[32] On July 18, 2003, CAW filed with the OLRB an unfair labour practice complaint alleging that the employer was not bargaining in good faith as it was obliged to do under s. 17 of the LRA, 1995. (OLRB file No. 1271-03-U)

[33] On July 23, 2003, the Minister referred to the OLRB, under s. 115 of the LRA, 1995, the issue as to whether the Minister had the authority to appoint a conciliation officer (OLRB file No. 1336-03M).

[34] On July 31, 2003, CAW filed an application for interim relief. CAW sought an expedited hearing expressing fear that its bargaining rights could end in January 2004, that it could be decertified one year after the certification if a conciliation officer was not appointed within one year of certification and no collective agreement was in place by the first anniversary

of certification (OLRB file No. 1414-03-M).

[35] MSIFN intervened in the 3 applications and gave "Notice of a Constitutional Question" to the Attorneys General of Canada and Ontario.

[36] On September 5, 2003, the OLRB heard submissions as to the manner in which the constitutional question should be phrased. After hearing submissions, the OLRB gave an oral decision, recorded in its written reasons of September 8, 2003. Those reasons have been set out earlier in these reasons.

[37] On September 16, 2003, the OLRB heard submissions as to whether it had jurisdiction to hear and whether it should entertain a constitutional question.

[38] On September 17, 2003, the OLRB held that it had jurisdiction and would hear the constitutional question.

[39] In *Martin and Laseur v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, the Court said:

> [31] Third, administrative tribunal decisions based on the *Charter* are subject to judicial review on a correctness standard: see *Cuddy Chicks, supra*, at p. 17. An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court. In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the Charter is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases.

[40] In *Martin*, the Court was reiterating what it had said in *Cuddy Chicks Ltd v. Ontario Labour Relations Board et al.* (1991), 81 D.L.R. (4th) 121, per LaForest J.:

p.129:

> In the result, the board has the authority to apply the Charter and to rule on the constitutionality of s. 2(b) of its enabling statute, in the course of the union's application for certification.

p. 129:

> The overarching consideration is that labour boards are administrative bodies of a high calibre. The tripartite model which has been adopted almost uniformly across the country combines the values of expertise and broad experience with acceptability and credibility. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* (1979), 97 D.L.R. (3d) 417 at p. 424, [1979] 2 S.C.R. 227, 79 C.L.L.C. ¶ 14,029, Dickson J. (as he then was) characterized the particular competence of labour boards as follows:
>
> The labour board is a specialized tribunal which administers a

> comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.
>
> It must be emphasized that the process of Charter decision-making is not confined to abstract ruminations on constitutional theory. In the case of Charter matters which arise in a particular regulatory context, the ability of the decision-maker to analyze competing policy concerns is critical. Therefore, while board members need not have formal legal training, it remains that they have a very meaningful role to play in the resolution of constitutional issues. The informed view of the board, as manifested in a sensitivity to relevant facts and an ability to compile a cogent record, is also of invaluable assistance. This is evidenced clearly by the weight which the judiciary has given the factual record provided by labour boards in division of powers cases: see, for example, *Northern Telecom Canada Ltd v. Communication Workers of Canada* (1983), 147 D.L.R. (3d) 1, [1983] 1 S.C.R. 733, 48 N.R. 161.
>
> That having been said, the jurisdiction of the board is limited in at least one critical respect: it can expect no curial deference with respect to constitutional decisions. Furthermore, a formal declaration of invalidity is not a remedy which is available to the board. Instead, the board simply treats any impugned provision as invalid for the purposes of the matter before it. Given that this is not tantamount to a formal declaration of invalidity, a remedy exercisable only by the superior courts, the ruling of the board on a Charter issue does not constitute a binding legal precedent, but is limited in its applicability to the matter in which it arises.

[41] On September 17, 2003, the OLRB ordered that MSIFN would be the first litigant to present its evidence on the constitutional question. The OLRB also set out a schedule for the serving and filing of pleadings.

[42] On September 17, 2003, MSIFN sought from Ferrier J. a stay of the OLRB's direction of September 17, 2003.

[43] In his endorsement of October 9, 2003, Ferrier 3. dismissed the application for a stay: [2003] 0.J. No. 3949. On October 9, 2003, the OLRB issued an order extending the time to serve and file pleadings.

[44] On October 30, 2003, after the parties had filed pleadings and documents, the OLRB indicated that much of the proposed evidence did not seem to be in dispute and asked for submissions from counsel for the parties as to whether a procedure echoing the litigation of applications under the Rules of the Procedure of the Superior Court of Ontario could be adopted, that is, file affidavits, cross-exam thereon and thereafter conduct trials of issues, if required, on specified issues of fact. The parties made their submissions on that date on that procedural issue.

[45] On November 7, 2003, CAW made a motion to the OLRB that it should hear submissions as to why the Minister should be advised to appoint a conciliation officer even though the constitutional question had not been determined.

[46] On November 12, 2003, the OLRB directed that the proceedings would proceed on the basis of the procedure proposed by the OLRB on October 30, 2003.

[47] On November 24, 2003, the OLRB heard the parties' submissions on the CAW's motion of November 7, 2003.

[48] On November 25, 2003, the OLR.B deferred decision on CAW's motion of November 7, 2003 until after the December 8, 2003 hearing on the constitutional issue.

[49] On December 3, 2003, counsel for the A.G. (Canada) moved to have the OIJRB adjourn the December 8, 2003, hearing to permit all parties time to file further evidence. Counsel for the A.G. (Ont) made a similar request. MSIFN opposed those requests.

[50] On December 4, 2003, the OLRB decided that the hearing scheduled for December 8, 2003 should proceed (that procedural ruling is not part of the judicial review application).

[51] On December 8, 2003, the OLRB heard the parties' submissions on the constitutional question. The OLRB had the affidavits filed by the parties, cross-examinations thereon, exhibits, casebooks and a factum from each party (except the employer) and from the intervenors.

[52] On December 12, 2003, the OLRB answered the constitutional question in the negative.

[53] On December 18, 2003, by letter, MSIFN asked the OLRB to reconsider its answer to the constitutional question.

[54] In its December 24, 2003, decision, the OLRB dismissed MSIFN's request for a reconsideration.

[55] On January 9, 2004, this judicial review application was launched by MSIFN.

VI. The material relied on by the parties and intervenors at the December 8, 2003 constitutional Hearing

[56] GBHGC filed no material and took no position on the constitutional question.

[57] The CAW relied on the affidavit of Mike Reuter, a national representative of the CAW.

[58] The MSIFN relied upon:

(i) The affidavit of Tracy Gauthier, the Chief.

(ii) The affidavit of Rennie Goose, past Chief.

(iii) The affidavit of Angela Robinson, counsellor of MSIFN.

(iv) The affidavit of James Morrison, research consultant and expert ethno historian regarding aboriginal issues and policy, and

(v) The affidavit of Mark Walters, Associate Professor, Faculty of Law, Queen's University, Kingston, Ontario.

[59] The A.G. (Ont) relied on:

(i) The affidavit of Alexander von Gernet, expert anthropologist and ethno historian concerning aboriginal peoples, and

(ii) The affidavit of Mort Mitchnick, lawyer, arbitrator, mediator and past Chair of the OLRB.

[60] The A.G. (Can) relied on the affidavit of Christine Gravel, Litigation Project Manager with the Office of Indian and Northern Affairs Canada.

[61] At the December 8, 2003, hearing before the OLRB:

(a) Counsel for A.G. (Ont) moved to strike out portions of the affidavit of Mark Walters, and

(b) Counsel for MSIFN moved to strike out all of the affidavit of Mon Mitchnick.

[62] The OLRB ruled that the affidavit of Mart Mitchnick be struck out and the affidavit of Mark Walters be left intact.

[63] In its written reasons of November 30, 2004, which amplify its reasons of December 12, 2003, the OLRB states:

> [70] All other tendered evidence and information was considered by the Board. In other words, with the exception of the affidavit of Mr. Mitchnick, everything else that the parties wished to put before the Board was and has been considered.
>
> [71] Unlike many other aboriginal rights cases that have been decided by the courts, there was no aboriginal oral history put before the Board. The First Nation's deponents provided information about the factual circumstances surrounding the passage of the Code, but did not provide any historical information about their First Nation. Rather, the historical evidence and information before the Board was derived from non-aboriginal experts on the basis of both primary and secondary research. This was supplemented with a significant quantity of scholarly

literature.

VII. 2 Decisions of the Supreme Court of Canada concerning labour relations and aboriginals that e-date the coming into force of s. 35 of the *Constitution Act* 1982

[64] In *Cardinal v. A.G. Alberta*, [1974] S.C.R. 695, 703, Martland J. (for a 6-3 majority) said:

> A Provincial Legislature could not enact legislation in relation to Indians, or in relation to Indian Reserves, but this is far from saying that the effect of s. 91(24) of the *British North America Act, 1867*, was to create enclaves within a Province within the boundaries of which Provincial legislation could have no application. In my opinion, the test as to the application of Provincial legislation within a Reserve is the same as with respect to its application within the Province and that is that it must be within the authority of s. 92 and must not be in relation to a subject-matter assigned exclusively to the Canadian Parliament under s. 91. Two of those subjects are Indians and Indian Reserves, but if Provincial legislation within the limits of s. 92 is not construed as being legislation in relation to those classes of subjects (or any other subject under s. 91) it is applicable anywhere in the Province, including Indian Reserves, even though Indians or Indian Reserves might be affected by it. My point is that s. 91(24) enumerates classes of subjects over which the Federal Parliament has the exclusive power to legislate, but it does not purport to define areas within a Province within which the power of a Province to enact legislation, otherwise within its powers, is to be excluded.

[65] In *Four B Manufacturing Limited v. United Garment Workers of America*, [1980] 1 S.C.R 1031, Beetz J. (for a 7-2 majority) said:

p. 1044:

> *Four B* was incorporated pursuant to the laws of Ontario to carry on business as a manufacturer of shoes on the Tyendinaga Indian Reserve No. 38, a reserve set aside for the Band of Indians known as the Mohawks of the Bay of Quinte. All of the issued shares of *Four B* are held by four brothers named Brant, all of whom are members of the Band.
>
> The business or operation of *Four B* consists entirely in the sewing of uppers on contract for the Bata North Star Jogger, a shoe manufactured by the Bata Shoe Company.
>
> *Four B* is in no way owned or controlled by the Band Council which will have no share in its profits.

....

> *Four B* occupies premises upon the Reserve pursuant to a three year renewable permit issued by Her Majesty the Queen in right of

> Canada with the approval of the Band Council.

p. 1045:

> The issue is whether *The Labour Relations Act* applies to the activities of *Four B* and its employees and the Board had jurisdiction to make the two decisions under review.
>
> In my view the established principles relevant to this issue can be summarized very briefly. With respect to labour relations, exclusive provincial legislative competence is the rule, exclusive federal competence is the exception. The exception comprises, in the main, labour relations in undertakings, services and businesses which, having regard to the functional test of the nature of their operations and their normal activities, can be characterized as federal undertakings, services or businesses:

p. 1047:

> I think it is an oversimplification to say that the matter which falls to be regulated in the case at bar is the civil rights of Indians. The matter is broader and more complex: it involves the rights of Indians and non-Indians to associate with one another for labour relations purposes, purposes which are not related to "Indianness"; it involves their relationship with the United Garment Workers of America or some other trade union about which there is nothing inherently Indian; it finally involves their collective bargaining with an employer who happens to be an Ontario corporation, privately owned by Indians, but about which there is nothing specifically Indian either neither Indian status is at stake nor rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc. For this reason, I come to the conclusion that the power to regulate the labour relations in issue does not form an integral part of primary federal jurisdiction over Indians or Lands reserved for the Indians.

p. 1049:

> In my view, this submission is an attempt to revive the enclave theory of the reserves in a modified version: provincial laws would not apply to Indians on reserves although they might apply to others. The enclave theory has been rejected by this Court in *Cardinal v. Attorney General for Alberta* and I see no reason to revive it even in a limited form. Section 91.24 of the *British North America Act*, 1867 assigns jurisdiction to Parliament over two distinct subject matters, Indians *and* Lands reserved for the Indians, not Indians *on* Lands reserved for the Indians.

See also: *Chippewas of Sarnia Band v. Canada (AG.)*, [1999] O.J. No. 1406 per A.G. Campbell J.

[66] Counsel for A.G. (Ont)'s factum makes this submission:

> 26. In this case, however, no party or intervener — including

> the Attorney General of Canada — takes the position that the *Canada Labour Code*, R.S.C. 1985, c. L-2, or the federal *Indian Act*, R.S.C. 1985, c. I-5, applies. There is therefore no conflict with a federal law. In this regard, it should be noted that the Supreme Court of Canada has stated that courts "should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity or, as in this case, actually intervenes to support it.
>
> *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at pp. 19-20, BA - Ontario, Vol.1, Tab 4
>
> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 S.C.C. 31 at para. [72], BA - Ontario Vol. 1, Tab 5.

VIII. *Constitution Act*, 1982

> s. 25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
>
> s. 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> s.52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[67] In its November 30, 2004, reasons, the OLRB said:

> [48] Up until 1982, aboriginal and treaty rights were subject to unilateral extinguishment by the Crown. Those rights that existed in 1982 obtained constitutional protection by virtue of section 35(1) of the Constitution Act. From that point forward, the Crown could not unilaterally abrogate such rights, but could limit these rights where justified on the basis of a substantial and compelling

public objective.

IX. Does the OLRB have jurisdiction to hear and decide questions under s. 35 of the Constitution?

[68] In *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, Bastarache J. (for the Court) said:

> [36] As a preliminary issue, I note that there is no basis for requiring an express empowerment that an administrative tribunal be able to apply s. 35 of the Constitution Act, 1982. There is no persuasive basis for distinguishing the power to determine s. 35 questions from the power to determine other constitutional questions, such as the division of powers under the *Constitution Act*, 1867 or a right under the *Charter*. Section 35 is not, any more than the *Charter*, "some holy grail which only judicial initiates of the superior courts may touch" (*Cooper* [[1996] 3 S.C.R 3854] at para. 70, per McLachlin J. (as she then was), dissenting). This Court has rejected the theory that Indian reserves are federal "enclaves" from which provincial laws are excluded: *Hogg, supra*, at p. 27-10, discussing *Francis* [[1988] 1 S.C.R. 1025]; *Four B* [[1980] 1 S.C.R. 1031]. Similarly, aboriginal rights do not constitute an enclave that excludes a provincially created administrative tribunal from ruling, at first instance, on the border between those aboriginal rights and a provincial law of general application. The arguments that s. 35 rights are qualitatively different — that they are more complex, and require greater expertise in relation to the evidence adduced — have little merit. As Moen J. noted in *Ermineskin Cree Nation v. Canada* (2001), 297 AR. 226, 2001 ABQB 760, at para. 51, in determining that a Human Rights Tribunal had jurisdiction to consider a s. 35 argument:
>
> [T]here is no principled basis for distinguishing *Charter* questions from s. 35 questions in the context of the Tribunal's jurisdiction to consider constitutional questions. In either case, the decision-maker is simply applying the tests set out in the case law to determine if the particular right claimed is protected by the *Constitution*. In either case, if the applicant is successful, the result is a declaration of invalidity or a refusal to apply only the particular statute or provision before the decision-maker.
>
> To the extent that aboriginal rights are unwritten, communal or subject to extinguishment, and thus a factual inquiry is required, it is worth noting that administrative tribunals, like courts, have fact-finding functions. Boards are not necessarily in an inferior position to undertake such tasks. Indeed, the more relaxed evidentiary rules of administrative tribunals may in fact be more conducive than a superior court to the airing of an aboriginal rights claim.
>
> [39] . . . .The essential question is whether the empowering legislation implicitly or explicitly grants to the tribunal the

> jurisdiction to interpret or decide any question of law. If it does, the tribunal will be presumed to have the concomitant jurisdiction to interpret or decide that question in light of s. 35 or any other relevant constitutional provision. Practical considerations will generally not suffice to rebut the presumption that arises from authority to decide questions of law. That is not to say, however, that practical considerations cannot be taken into consideration in determining what is the most appropriate way of handling a particular dispute where more than one option is available.

[69] Here, the LRA 1995 (supra) contains 2 privative clauses:

> s.114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it. ...
>
> s.116 - it excludes judicial review, subject to the courts' overriding supervision and constitutional jurisdiction.

[70] The only relevant issue is the validity of the MSIFN's Code, a question that depends entirely on whether MSIFN has a s.35 right to govern its labour relations. This issue comes within the OLRB's jurisdiction because it is an issue that must be resolved in determining whether or not the LRA 1995 applies.

[71] In my view, based on the authorities cited, the OLRB had jurisdiction to decide the question under s. 35 of the Constitution.

X. Establishing s. 35 Constitution Aboriginal Rights

[72] In *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911, 925, McLachlin C.J. (for the 5-2 majority) said:

> [8] The issue can be addressed in the following manner:
>
> A. What is the Nature of Aboriginal Rights?
>
> B. What is the Aboriginal Right Claimed?
>
> C. Has the Claimed Aboriginal Right Been Established?
>
> (1) Evidentiary Concerns — Proving Aboriginal Rights
>
> (a) Admissibility of Evidence in Aboriginal Right Claims
>
> (b) The Interpretation of Evidence in Aboriginal Right Claims
>
> (2) Does the Evidence Show an Ancestral Mohawk Practice of Trading North of the St. Lawrence River?
>
> (3) Does the Evidence Establish that the Alleged Practice of Trading Across the St. Lawrence River Was

Integral to Mohawk Culture and Continuous to the Present Day?

[11] The common law status of aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing aboriginal and treaty rights: *Constitution Act, 1982*, s. 35(1). The enactment of s. 35(1) elevated existing common law aboriginal rights to constitutional status (although, it is important to note, the protection offered by s. 3 5(1) also extends beyond the aboriginal rights recognized at common law: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 136). Henceforward, aboriginal rights falling within the constitutional protection of s. 35(1) could not be unilaterally abrogated by the government. However, the government retained the jurisdiction to limit aboriginal rights for justifiable reasons, in the pursuit of substantial and compelling public objectives: see *R. v. Gladstone*, [1996] 2 S.C.R. 723, and *Delgamuulcw, supra*.

[12] In the seminal cases of *R. v. Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuulrw, supra*, this Court affirmed the foregoing principles and set out the test for establishing an aboriginal right. Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet, supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

[3] ... The question is whether the impugned act represents the modem exercise of an ancestral practice, custom or tradition.

....

[15] In *Van der Peet, supra*, at para. 53, the majority of this Court provided three factors that should guide a court's characterization of a claimed aboriginal right: (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right; (2) the nature of the governmental legislation or action alleged to infringe the right, i.e. the conflict between the claim and the limitation; and (3) the

> ancestral traditions and practices relied upon to establish the right. The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed. An overly narrow characterization risks the dismissal of valid claims and an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society: see R. *v. Pamajewon*, [1996] 2 S.C.R. 821.

[73] In its reasons of November 30, 2004, from para. 46 - 86, the OLRB refers to the tests set down by the Supreme Court of Canada in order to establish an aboriginal right:

> (1) *Mitchell v. MN. R. (supra)*; (2) *R. v. Van der Peet (supra)*; (3) *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[74] The OLRB concluded with regard to the appropriate characterization of the claimed aboriginal right:

> (a) MSIFN asserts that the law which governs its labour relations and which binds the GBHGC (employer) is not the LRA 1995 but its Code of June 6, 2003 and that the "action" to be considered is the passing and enforcement of the Code.
>
> (b) The government legislation and action is the LRA 1995 and its enforcement.
>
> (c) The ancestral tradition and practices relied upon by MSIFN to establish the right are assertions of power and authority to control how labour is organized on their territory and the rights to control access to their lands. The right is asserted under the umbrella of self government dating before first contact with Europeans and continued on down in the treaty relationship of the Covenant Chain.

[75] The OLRB concluded at para. 65:

> In these circumstances the proper characterization of the rights asserted here is the right of the First Nation to regulate labour relations on their reserve lands.

XI. Burden of Proof

[76] The onus to establish an aboriginal or a treaty right is upon the MSIFN because it is asserting the alleged right.

[77] In R. *v. Van der Peet, (supra)*, Lamer C.J. (for the 7-2 majority) said:

> [46] ... the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

[78] In *R. v. Marshall (1)*, [1999] 3 S.C.R. 456, the Court confirmed that the onus was on the party alleging the right to prove the treaty or the distinctive tradition or custom.

XII. Conclusions of the OLRB as to whether or not the MSIFN satisfied the onus on it to rove an aboriginal right under s. 35 of the Constitution for MSIFN to regulate its labour relations

[79] The OLRB's reasons of November 30, 2004, state:

> 78. If one accepts the entirety of the expert evidence put forward by the First Nation, it establishes that labour was organized consensually through community and kinship relationships, and further, that access to territory controlled by the First Nation and activities carried out in the territory was controlled by councils of chiefs.
>
> 79. The evidence also established conclusively, that the regulation and management of labour relations as we understand that term, was in no way part of the traditional culture or practices of the First Nation. There can be no doubt that there were no employees or employers and certainly no groups or organizations analogous to trade unions that purported to represent the interests of either employers or employees within the society. There was no labour market, nor anything resembling a wage-labour relationship where labour would be sold in exchange for some form of compensation. There is no evidence at all to suggest that the First Nation had a traditional practice whereby a decision making council (like the Dbaaknigewin) dealt in a hierarchical and coercive (terms used in the evidence) way with the regulation of relationships between what we might think of as employers, employees and groups of employees.
>
> 80. Even if one were to recast the notion of "labour relations" at a much higher level of generality, there is nothing in the evidence and information provided by the First Nation to suggest that there was a practice of organized relationships delineating responsibilities and obligations as between those who would perform labour, and those who would have labour performed. Moreover, (and this goes to the second branch of the test) it can certainly not be said that any such relationships formed an integral or defining part of First Nation's society.
>
> 81. It would be difficult on any rational understanding of the evidence before the Board to conclude that the first branch of the test has been met. There is no basis for concluding that there is an ancestral practice, custom or tradition which could support the claimed right — that being the regulation of labour relations on the territory of the First Nation.
>
> 82. This conclusion reached on the first point is really dispositive of the second and third branches of the test. As there is no ancestral practice of regulating labour relations, there can be no practice or custom which was integral to and distinctive of the pre-contact society

> and there can be no continuity between the pre--contact practice and the contemporary claim.
>
> 83. The real difficulty in this case is similar to that dealt with by the Supreme Court in *Pamajewon* — that there is nothing about the right being asserted which is in any way distinctive to the First Nations society historically unless the right itself is cast as broadly as the general right of "self-government". Even if one took a broader notion of the characterization of aboriginal rights as reflected in the dissent by Madame Justice L'Heureux-Dube in *Pamajewon*, there is nothing in the record upon which one could find that there were ancestral practices that managed labour in any particular distinct way.
>
> 86. ....Certainly it cannot be said that the culture would have been "fundamentally altered" without the ability to govern the organization of labour. That ability could not have "made the society what it was".

XIII. Treaty Rights

[80] The MSIFN also claims in this case that aboriginal rights flow from:

(a) The Covenant Chain treaty relationship.

The OLRB, after considering the evidence, stated:

> 91. Even if one adopts the submissions of the First Nation and assumes that the Covenant Chain did form a treaty upon which the First Nation may rely, it is difficult to see how this treaty provides for the rights of self-government or the organization of labour on First Nation territory.
>
> 92. It is undisputed that the Covenant Chain does not touch in any way upon the organization of the performance of labour. Rather, the First Nation argues that the Covenant Chain continues the aboriginal right of self-government that predated First European contact and has, since then, not been surrendered.
>
> 93. The practices which are protected under the Covenant Chain, according to the First Nation, are cast at the same level of generality as those asserted as inherent rights. It is clear even from the evidence relied upon by the First Nation that rights which might have been continued from this "treaty" have nothing to do with and do not speak in any way to the regulation of activity as between employers and employees.

(b) The Treaty of Niagara of 1764

[81] MSIFN claims this Treaty establishes a continuation of the Covenant Chain Treaty relationship.

[82] The OLRB concluded that the Treaty of Niagara is a "treaty of peace, friendship and trade". Mr. Mark Walters, MSIFN's expert, confirmed this during his cross-examination on

December 3, 2003.

[83] The OLRB further concluded:

> 96. As the Attorney General of Ontario has submitted, the circumstances surrounding the making of the Treaty of Niagara are broadly similar to the peace and friendship treaties that were before the Supreme Court in *Marshall (1), supra, and (2),* [1993] 3 S.C.R. 533. Nothing in either of the Court's decisions in that matter suggests that these types of treaties should be understood to support rights of self-government.
>
> 97. Having regard to the evidence before the Board concerning the meaning of the Covenant Chain, the documentary material relating to the Treaty of Niagara and the Supreme Court's analysis of the nature of treaty rights in *Marshall (1) or (2)* and *Badger,* [1996] 1 S.C.R. 771, the Board concludes that there is no treaty right established which would permit the conclusion either of any right to regulate labour relations on First Nations territory, or more broadly, a right of self-government.

[84] In *Paul (supra),* the Court said:

> [33] . . . The "core" of Indianness has not been exhaustively defined. It encompasses the whole range of aboriginal rights that are protected by s. 3 *5(1): Delgamuukw, supra,* at para. 178. For present purposes, it is perhaps more easily defined negatively than positively. The core has been held not to include labour relations *(Four B Manufacturing Ltd* v. *United Garment Workers of America,* [1980] 1 S.C.R. 1031) and highway traffic regulation on reserves *(R. v. Francis,* [1988] 1 S.C.R. 1025). On the evidence adduced in *Kitkatla Band, supra,* at para. 70, the status or capacity of Indians was found not to be impaired by the impugned *Heritage Conservation Act,* R.S.B.C. 1996, c. 187. Given that these substantive matters were held not to go to the core of Indianness, I cannot see how the procedural question in this appeal can. The respondent has failed to demonstrate that the procedural right to raise at first instance a defence of aboriginal rights in a superior court, as opposed to before a provincially constituted tribunal, such as the Commission, goes to the core of Indianness.

XIV. Justification

[85] Because the OLRB concluded that there was neither an aboriginal pre-contact right nor a treaty right that qualified under s. 35 of the Constitution, there was no need to address the doctrine of justification but did so in para. 98 to para. 102. The OLRB concluded:

> 103. For these reasons, the Board concludes that if there is an aboriginal or treaty right which has been infringed by those portions of the Act challenged by the Intervenor, such infringement is justified.

XV. Standard(s) of review to be applied by the Divisional Court to the impugned OLRB's decisions

A. Constitutional Questions

[86] As stated by the Supreme Court of Canada at para. 39 and 45 of its decision in *Paul, supra*, the OLRB has the jurisdiction to decide questions relating to aboriginal rights arising in the course of a labour relations hearing but the decision is reviewed on a standard of correctness. Section 114(1) of the LRA 1995 states:

> The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it....

[87] The above quotation from *Paid* is a reaffirmation of what was said by LaForest J. (for the majority) in *Cuddy Chicks* v. *OLRB (supra)* at p. 128:

> Section 106(1) [now s. 114(1)] of the *Labour Relations Act* stipulates that the board has exclusive jurisdiction "to determine all questions of fact or law that arise in any matter before it...". The legislature expressly, and without reservation, conferred authority on the board to decide points of law. In addition, the Act confers powers on the board to determine questions of law and fact relating to its own jurisdiction. Section 124, for example, gives it authority to decide if a matter is arbitrable. The issue, then, is whether this authority with respect to questions of law can encompass the question of whether a law violates the Charter. It is clear to me that a Charter issue must constitute a question of law; indeed, the Charter is part of the supreme law of Canada. This comports with the view expressed in *Douglas College* that the statutory authority of the arbitrator in that case to interpret any "Act" must include the authority to interpret the Charter.

[88] In *Martin and Laseur v. Nova Scotia (Workers Compensation Board) (supra)* the Supreme Court of Canada said at para. 31:

> ... .administrative tribunal decisions based on the Charter are subject to judicial review on a correctness standard......An error of law by an administrative tribunal interpreting the Constitution can always be reviewed fully by a superior court.

[89] No counsel argued that any standard other than correctness applied to the OLRB's decisions on constitutional questions.

B. Procedural Issues

[90] As set out in the factum of counsel for the OLR.B, the Court of Appeal for Ontario in *Re Cedarvale Tree Services Ltd. and Labourers' International Union, Local 183* (1971), 22 D.L.R. *(3d)* 40, 49 said:

> ....that under the *Labour Relations Act* the Board is master of its own house not only as to all questions of fact and law falling within the ambit of the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my

> view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to it to be just and convenient in the particular circumstances of the case before it.

[91] Section 110(16) of the LRA 1995 permits the OLRB to determine its own practice and procedure, subject to the parties' right to be heard fully.

[92] In the proceedings listed in s. 110(18) of the LRA 1995, the OLRB may make rules (s. 110(20)) applying to that subsection. The rules under subsection (18) take precedence over the *Statutory Powers Procedure Act.*

[93] Under s. 111 (2)(e), the OLRB may accept oral or written evidence whether or not admissible in a court of law.

[94] The OLRB, pursuant to s. 98 of the LRA 1995, has made Rules 76 and 77 in relation to interim orders.

[95] Section 2 of the LRA 1995 states, in part:

> 2. The following are the purposes of the Act:
>
> 1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

....

> 6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
>
> 7. To promote the expeditious resolution of workplace disputes.

[96] Section 114 and 116 of the LRA 1995 are 2 full privative clauses.

[97] The factors to be taken into account and weighed in deciding "standard of review" are set out in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193, 209 where they were discussed at paras. 26 - 38.

[98] At para. 26, Bastarache J. (for a 4-2 majority) said:

> [26] the reviewing court must ask: "was the question which the provision raises one that was intended by the legislators to be left to the exclusive jurisdiction of the Board?"
>
> The Supreme Court of Canada then set out the factors to be considered in deciding on the standard of review:
>
> (i) privative clauses, if any,
> (ii) expertise of the tribunal or board per se and in comparison to the court,

> (iii) purpose of the act as a whole and the particular provisions under consideration,
>
> (iv) the "nature of the problem": a question of law or fact?

[99] In *Voice Construction Ltd. v. Construction General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, Major J. said:

> [18] A decision of a specialized tribunal empowered by a policy-laden statute, where the nature of the question falls squarely within its relative expertise and where that decision is protected by a full privative clause, demonstrates circumstances calling for the patent unreasonableness standard.

[100] In its factum, the OLRB submits:

> Based on the "pragmatic and functional approach", it is submitted that the appropriate standard of review for the Board's procedural decisions is patent unreasonableness.

The Supreme Court of Canada held in *Canada (Attorney General) v. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 that a patently unreasonable decision is one where the "result must almost border on the absurd".

[101] With respect, I agree that the standard of review applicable to the non-constitutional issues faced by the OLRB in this case is one of patent unreasonableness.

XVI. Conclusions

[102] In my view, the OLRB correctly followed all the decisions of the Supreme Court of Canada (supra) in deciding that it had jurisdiction to decide whether or not the LRA 1995 applied to the labour relations between the MSIFN and the GBHGC. In my view, the OLRB correctly framed and characterized the issue according to the law and correctly concluded that the MSIFN had not tendered any evidence to satisfy its onus of establishing an aboriginal right and/or a treaty right as claimed by MSIFN, "to regulate labour relations on their reserve lands".

[103] In my view, the OLR.B had statutory authority to conduct the proceedings as it did and statutory authority to come to its non-constitutional decisions in this case. It cannot be said that any one of those decisions was patently unreasonable.

XVII. Result

[104] The application for judicial review is dismissed.

XVIII. Costs

[105] Counsel for the OLRB requests that "no costs be awarded for or against it". It is so ordered.

[106] Counsel for A.G. (Ont) seeks costs of $7,500.00. The Applicant shall pay the costs of A.G. (Ont), as requested, in the sum of $7,500.00, within 30 days of the release of these reasons.

[107] Counsel for A.G. (Can) and counsel for CAW each seeks costs in an unspecified amount.

[108] If counsel for the applicant, counsel for K.G. (Can) and counsel for CAW are unable to agree on costs within 15 days of the release of these reasons, those counsel shall file brief written submissions on costs within 25 days of the release of these reasons. Thereafter, costs will be fixed.

1702-04-R; 3120-04-R; 3172-04-R; 3173-04-R; 3174-04-R (Court File No. 126/06) Greater Essex County District School Board, Applicant v. International Brotherhood of Electrical Workers, Local 773; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, International Union of Bricklayers and Allied Craftworkers, Local 6, The International Union of Painters and Allied Trades, Local 1494, and Labourers International Union of North America, Local 625 and OLRB, Respondents

Construction Industry – Judicial Review – Public Sector Labour Relations Transition Act – Related Employer – Sale of Business – Stay – The Board exercised its discretion to treat the Greater Essex County District School Board and the former Board of Education of the City of Windsor as a single employer pursuant to s. 1(4) as a result of the amalgamation of the Essex County Board of Education with the Windsor Board, an event triggered by the PSLRTA – Subsequent to its related employer decision the Board scheduled a grievance, alleging a failure to comply with the provincial agreement, involving some of the parties, which had been adjourned pending the related employer application – The School Board brought an application for a stay to Divisional Court pending the hearing of its judicial review application on the finding of relatedness – The Court dismissed the motion noting that the parties had secured an early date for the judicial review application, and while commenting that there "may be some benefit gained by the parties" if the grievance was adjourned pending the outcome of the judicial review application, the Court left that issue to be determined by the Board, given the slow pace with which the litigation had been advanced – Motion for stay dismissed

Superior Court of Justice (Divisional Court), Matlow, J. June 28, 2006.

THE COURT

This motion is dismissed. The parties have obtained a date for the hearing of the Judicial Review application and it will proceed on August 15, 2006.

There may be some benefit to be gained by the parties if the grievance hearing scheduled to July 13, 2006 before the Board were adjourned to await the outcome of the judicial review application. However, especially in light of the slow pace with which the legislation has been advanced by the applicant. I prefer to leave this issue for the determination of the Board.

The respondent unions are entitled to the costs of the motion, fixed if asked at $3,000, payable within 30 days.

2464-03-U (Court File No. 567/04) Naseem Jamal, Applicant v. Ontario Public Service Employees Union and OLRB; Respondents

Duty of Fair Representation – Judicial Review – The Court held that a dismissal of a duty of fair representation complaint for delay was subject to a standard of patent unreasonableness – The Board's unpublished rule of thumb regarding delay was presumptive only, and the Board gave consideration to applicable criteria – There was nothing clearly irrational or so flawed in the Board's ruling to cause the Court to interfere with the decision – Application dismissed – Leave to appeal to Court of Appeal dismissed February 3, 2006

Supreme Court of Canada, Binnie, Deschamps and Albella JJ. June 1, 2006.

THE COURT

The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number M33093, dated February 3, 2006, is dismissed with costs to Respondent OPSEU.

CASE LISTINGS APRIL 2006

PAGE

1. Applications for Certification 141
2. Applications for Declaration of Related Employer 156
3. Sale of a Business 157
4. Union Successor Rights 158
5. Applications for Declaration Terminating Bargaining Rights 158
6. Referral from Minister (Sec. 115) 160
7. Complaints of Unfair Labour Practice 161
8. Applications for Interim Order 164
9. Applications for Consent to Early Termination of Collective Agreement 165
10. Jurisdictional Disputes 165
11. Applications for Determination of Employee Status 165
12. Complaints under the Occupational Health and Safety Act 165
13. Construction Industry Grievances 165
14. Appeals – Employment Standards Act 168
15. Appeals – Occupational Health and Safety Act 172
16. Pay Equity Act 173
17. Applications for Reconsideration of Board's Decision 173

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 2006

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2819-05-R: Labourers International Union of North America, Local 837 (Applicant) v. National Rigging and Transportation Ltd. (Respondent)

Unit: "all construction labourers in the employ of National Rigging and Transportation Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of National Rigging and Transportation Ltd. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand and the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of
non-working foreman" (30 employees in unit)

3513-05-R: Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Wabi Development Corporation (Respondent)

Unit: "(1) all labourers, journeymen and apprentice carpenters, journeymen and apprentice millwrights, journeymen and apprentice ironworkers in the employ of Wabi Development Corporation in all sectors of the construction industry within a radius of 81 kilometers (approximately 50 miles) of the Timmins Federal Building, save and except non-working foremen and persons above the rank of non-working foreman, office and clerical staff and those employees currently covered by an existing collective agreement.

(2) labourers, journeymen and apprentice carpenters, journeymen and apprentice millwrights, journeymen and apprentice ironworkers, journeymen and apprentice operators in the employ of Wabi Development Corporation in all sectors of the construction industry in the City of Temiskaming Shores, save and except non-working foremen and persons above the rank of non-working foreman, office and clerical staff and those employees currently covered by an existing collective agreement.

4007-05-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1544484 Ontario Ltd. o/a D/A Drywall (Respondent)

Unit: "all painters and painters' apprentices in the employ of 1544484 Ontario Ltd. o/a D/A Drywall in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of 1544484 Ontario Ltd. o/a D/A Drywall in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk; the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township); the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit) (*Clarity Note*)

4269-05-R: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Target Painting Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Target Painting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Target Painting Inc. in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0030-06-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 67 (Applicant) v. Keith's Plumbing and Heating Inc. (Respondent)

Unit: "all plumbers and plumbers' apprentices in the employ of Keith's Plumbing and Heating Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices in the employ of Keith's Plumbing and Heating Inc. in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0053-06-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Ash Plumbing & General Contractors Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ash Plumbing & General Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Ash Plumbing & General Contractors Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

0101-06-R: Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Applicant) v. Royal Ready Construction Limited (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same and all construction labourers working for Royal Ready Construction Limited in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville, Halton Hills and Milton in the Regional Municipality of Halton, the Towns of Ajax and Pickering in the Regional Municipality of Durham, the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township in all sectors of the construction industry save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

0178-06-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Nearchou Enterprises Ltd. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Nearchou Enterprises Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Nearchou Enterprises Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (6 employees in unit)

0199-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. M L Drywall Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of M L Drywall Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (5 employees in unit)

0203-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dynacon Structures Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices and construction labourers in the employ of Dynacon Structures Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to Vote

1152-03-R: Allied Construction Employees Local 1030, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Queensgate Homes (Respondent)

Unit: "all construction labourers in the employ of Queensgate Homes in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	7

0708-04-R: Public Service Alliance of Canada (Applicant) v. Georgian Downs Limited (Respondent)

Unit: " all employees of Georgian Downs Limited in the Town of Innisfil, the City of Newmarket, the Town of Bracebridge and Rama (Chippewas of Mnjikaning), save and except executive chef, departmental managers, one mutual supervisor, persons above the rank of executive chef or departmental manager, administrative office employees, and security personnel." (148 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

3179-04-R: Communications, Energy and Paperworkers Union of Canada, Local 2003 (Applicant) v. Jungbunzlauer Canada Inc. (Respondent)

Unit: "all employees employed by the Company as Shift Engineers in the Regional Municipality of Niagara, save and except the Assistant Chief Engineer and persons above the rank of Assistant Chief Engineer" (4 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2860-05-R: Service Employees International Union, Local 1.on (Applicant) v. Southwind Retirement Residence (Respondent) v. Retail, Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Intervenor)

Unit: "all employees of Southwind Retirement Residence in the City of Sudbury, save and except Maintenance, Activity Director, Registered Nurses, supervisors, persons above the rank of supervisor, and office and clerical staff" (16 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

3674-05-R: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. Nel-Tekk Industrial Specialties Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Nel-Tekk Industrial Specialties Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Nel-Tekk Industrial Specialties Inc. in all sectors of the construction industry in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3903-05-R: Service Employees International Union Local 1.on (Applicant) v. Bon Air Retirement Residence (Respondent)

Unit: "all employees of CSH Bon-Air Inc. in the Town of Cannington, save except supervisors and persons above the rank of supervisor and office and clerical staff, physiotherapists, occupational therapists and speech therapists" (74 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	64
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	56
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	8

4088-05-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Ultraframe (North America) Ltd. (Respondent)

Unit: "all employees of Ultraframe (North America) Ltd. in the City of Vaughan, save and except supervisors, and those above the rank of supervisor, office, clerical, technical and sales staff" (19 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

4165-05-R: Eastern Ontario Volunteer Firefighters Association, Local 920 affiliated with Christian Labour Association of Canada (CLAC) (Applicant) v. The Corporation of the Town of Midland (Respondent) v. The Midland Professional Fire Fighters Association (Intervenor)

Unit: "all volunteer firefighters as defined by subsection 1(1) of the Fire Protection and Prevention Act, 1997, employed by the Corporation of the Town of Midland, save and except the Deputy Chief and persons above the rank of Deputy Chief" (19 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

4174-05-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 58 (Applicant) v. The Board of Regents of Victoria University (Respondent) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Intervenor)

Unit: "all stage employees of the Board of Regents of Victoria University at the Isabel Bader Theatre, 93 Charles Street West, Toronto, regularly employed for not more than twenty-four (24) hours per week, save and except Functions Co-ordinator and those above the rank of Functions Co-ordinator" (2 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4192-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Organic Resource Management Inc. (Respondent)

Unit: "all employees of Organic Resource Management Inc., working at or out of (in) the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff" (25 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	3

4193-05-R; 4194-05-R: Power Workers' Union, Canadian Union of Public Employees, Local 1000 - CLC (Applicant) v. EPCOR Regional Power Services LP (Respondent)

Unit: "all employees of EPCOR Regional Power Services LP at RR#1, Site #5, Compound 6, Town of Tunis, (Tunis Power Plant); 47 Gough Road, the Town of Kapuskasing (Kapuskasing Power Plant); Lot 13 Concession Road IV, the Township of Stoddard (Calstock Power Plant); Highway 11, Orient Bay, the Township of Nipigon (Nipigon Power Plant), save and except plant supervisors and persons above the rank of plant supervisor" (9 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

4195-05-R: Service Employees International Union Local 1.on (Applicant) v. Sodexho MS Canada Limited (Respondent)

Unit: "all employees of Sodexho MS Canada Limited employed at Hellenic Home for the Aged located at 2411 Lawrence Avenue East, in the City of Scarborough, save and except executive chef, office staff, clerical staff, dietician, student dietician, and persons above the rank of supervisor" (13 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

4197-05-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 357 (Applicant) v. The Stratford Shakespearean Festival of Canada (Respondent)

Unit: "all employees of The Stratford Shakespearean Festival of Canada in the City of Stratford engaged in maintenance of the building and grounds and plant operations, save and except foremen, persons above the rank of foreman, and supervisor, office and sales staff, students employed during the school vacation period and employees covered by existing collective agreement with The Stratford Shakespearean Festival of Canada" (36 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	33
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4244-05-R: Northern Ontario Joint Council of the Retail Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. Gensteel Doors Ontario Inc. (Respondent)

Unit: "all employees of Gensteel Doors Ontario Inc. in Cornwall, Ontario, save and except supervisors and those above the rank of supervisor, office and sales staff" (11 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

4271-05-R: Ontario Nurses' Association (Applicant) v. York Central Hospital (Respondent) v. Ontario Public Service Employees Union (Intervenor)

Unit: "all Registered Nurses and Nurses with a temporary certificate of registration employed in a nursing capacity at York Central Hospital, save and except Nurse Managers and persons above the rank of Nurse Manager, Occupational Health Nurse, Clinical Nurse Specialists and persons in positions for which another trade union held bargaining rights as of March 29, 2006" (700 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	399
Number of persons who cast ballots	334
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	330
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	196
Number of ballots marked against applicant	135

Number of ballots segregated and not counted	3

4273-05-R: Service Employees International Union Local 1.on (Applicant) v. Participation House Toronto Parent Association (Respondent)

Unit: "all employees of Participation House Toronto Parent Association at the Goldcrest Integrated Support Care Centre also known as the Goldcrest Co-op Inc. in the City of Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical employees" (10 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

4280-05-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Nexacor Realty Management Inc. (Respondent) v. Canadian Telecommunications Employees' Association (Intervenor)

Unit: "all clerical and associated employees of Nexacor Realty Management Inc. in the Province of Ontario, including the City of Toronto, the City of London, the City of Ottawa, save and except managers and those above the rank of manager" (16 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	0

0017-06-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Community Lifecare Inc. c.o.b. Lynde Creek Manor Retirement Residence (Respondent)

Unit: "all employees of Community Lifecare Inc. c.o.b. Lynde Creek Manor Retirement Residence in the Town of Whitby, Ontario, save and except General Manager, persons above the rank of General Manager, Dietary Manager, Marketing/Activity Director and Wellness Coordinator" (10 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0026-06-R: Teamsters Local Union No. 879 (Applicant) v. Alfa Paper Products Inc. (Respondent)

Unit: "all employees of Alfa Paper Products Inc. at 735 Strathearne Avenue, Hamilton, Ontario, L8H 5L3, save and except supervisors, persons above the rank of supervisor, office, sales, clerical and managerial staff" (19 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

0041-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Trim-Gard Company Limited (Respondent)

Unit: "all employees of Trim-Gard Company Limited in the City of London, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff" (18 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	4

0047-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Arrowhead Industrial Services Inc. (Respondent)

Unit: "all employees of Arrowhead Industrial Services Inc. in the Municipality of Chatham-Kent, save and except supervisors, and those above the rank of supervisor" (13 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	12

Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0054-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Sheraton Gateway Hotel (Respondent)

Unit: "all employees of the Sheraton Gateway Hotel, Pearson International Airport, Terminal 3, Mississauga, Ontario, save and except supervisors and those above the rank of supervisor, office, clerical, sales, conference services, security staff, co-op students and students employed during the school vacation period" (190 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	206
Number of persons who cast ballots	162
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	149
Number of segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	115
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	13

0070-06-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Ready Bake Foods Inc. (Respondent)

Unit: "all quality assurance employees of Ready Bake Foods Inc. located at 2095 Meadowvale Boulevard in the City of Mississauga, save and except quality assurance supervisors and persons above the rank of quality assurance supervisor" (3 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0086-06-R: Service Employees International Union, Local 1.on (Applicant) v. TLC & Medical Equipment Ltd. O/A Care-Plus (Respondent)

Unit: "all employees of TLC & Medical Equipment Ltd. O/A Care-Plus in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, registered nurses, registered practical nurses, graduate nurses, rehabilitation and therapy staff, laboratory staff, office and clerical staff, maintenance staff and students employed during the school vacation period." (270 employees in unit) *(Having regard to the agreement of the parties) (Clarity Note)*

Number of names of persons on revised voters' list	225
Number of persons who cast ballots	166
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	165
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	97
Number of ballots marked against applicant	67
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

0014-06-R: Canadian Union of Public Employees (Applicant) v. Arthur Paulson Cleaning Services (Respondent)

0029-06-R: Teamsters Local Union No. 938 (Applicant) v. Stock Transportation Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

4157-04-R: Ontario Public Service Employees Union (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as Woodbine Racetrack Slots (Respondent)

Unit: "all employees of Ontario Lottery and Gaming Corporation c.o.b. as Woodbine Racetrack Slots in the City of Toronto, save and except supervisors and persons above the rank of supervisor, security, surveillance, office and clerical personnel." (570 employees in unit)

Number of names of persons on revised voters' list	583
Number of persons who cast ballots	539
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	520
Number of segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	191
Number of ballots marked against applicant	326
Number of ballots segregated and not counted	19

2326-05-R: Teamsters Local Union 847, AFL-CIO-CLC (Applicant) v. A. Berger Precision Ltd. (Respondent)

Unit: "all employees of A. Berger Precision Ltd. working in the City of Brampton, save and except supervisors and persons above the rank of supervisor, office and clerical staff, sales employees and students employed during the summer holidays" (102 employees in unit)

Number of names of persons on revised voters' list	102
Number of persons who cast ballots	96

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	78
Number of segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	27
Number of ballots marked against applicant	49
Number of ballots segregated and not counted	18

3652-05-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1290746 Ontario Limited o/a Spadafora Drywall Services (Respondent)

Unit: "all painters and painters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the responding party in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, and the City of Hamilton, the City of Burlington and that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman. Clarity Note: drywall tapers are included in the bargaining unit." (19 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	0

3919-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Neil Montague Construction Limited (Respondent)

Unit: "all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin; the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

4228-05-R: United Food & Commercial Workers, Local 206 (Applicant) v. Dinecorp Hospitality Inc. (Respondent)

Unit: "all persons employed by Dinecorp Hospitality Inc. as waitresses, waiters, seaters, greeters, buspersons, kitchen staff, cashiers, bartenders, and students at Swiss Chalet Take Out and Restaurant, in the City of Orillia, save and except Assistant Dining Room Manager and persons above the rank of Assistant Dining Room Manager." (47 employees in unit)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	0

4292-05-R: Labourers' International Union of North America, Local 1089 (Applicant) v. GMS General Maintenance Services (Respondent) v. Construction Workers Local 53 affiliated with Christian Labour Association of Canada (Intervenor)

Unit: "all construction labourers in the employ of GMS General Maintenance Services in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of GMS General Maintenance Services in all other sectors of the construction industry in the County of Lambton, save and except non-working foremen and persons above the rank of non- working foreman" (0 employees in unit)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	4
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	10
Number of ballots segregated and not counted	0

4308-05-R: United Food and Commercial Workers Union, Local 1993 (UFCW Local 1993) (Applicant) v. Georgia-Pacific (Respondent)

Unit: "all production employees of Georgia-Pacific at 123 Bentworth Avenue, Toronto, Ontario, save and except those covered by subsisting collective bargaining agreements, office employees, drivers, managers, team leaders and lead hands and those above the rank of team leader, and those excluded by the Act" (145 employees in unit)

Number of names of persons on revised voters' list	151
Number of persons who cast ballots	135
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	124
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	77
Number of ballots segregated and not counted	11

4310-05-R: Labourers' International Union of North America, Local 1089 (Applicant) v. GMS General Maintenance Services (Respondent) v. Construction Workers Local 53 affiliated with Christian Labour Association of Canada (Intervenor)

Unit: "all employees of GMS General Maintenance Services employed in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman, office and clerical staff" (32 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	27
Number of ballots segregated and not counted	9

0052-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Keiper Limited (Respondent)

Unit: "all employees of Keiper Limited in the City of London, save and except supervisors, those above the rank of supervisor, team leaders, office, clerical and sales staff." (420 employees in unit)

Number of names of persons on revised voters' list	350
Number of persons who cast ballots	388
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	318
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	59
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	135
Number of ballots marked against applicant	194
Number of ballots segregated and not counted	58

Applications for Certification Withdrawn

0100-02-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Exeter Developments (Respondent)

0329-04-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dominion Sheet Metal & Roofing Works (Respondent) v. Universal Workers Union Labourers' International Union of North America Local 183 (Intervenor)

3642-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. WJR Refractory Sales and Services Inc. and, Refractory Resources Ltd. (Respondents)

3790-05-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Northwad Construction (Respondent)

4139-05-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("United Steelworkers") (Applicant) v. Vitalaire Canada Inc. (Respondent)

4241-05-R: Teamsters Local Union No. 938 (Applicant) v. Laidlaw Transit Limited (Respondent)

0068-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Baun Construction Inc. (Respondent)

0117-06-R: Retail, Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. Sodexho Canada Ltd. (Respondent)

0123-06-R: Labourers' International Union of North America, Local 837 (Applicant) v. Omni Facility Services Canada Corp. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0891-02-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Presidential Developments Ltd. and/or, Exeter Developments and/or, Exeter Millennium (Eight Spadina Road) Limited and/or, Exeter Millennium Corporation (Respondents) *(Withdrawn)*

0553-04-R: Labourers' International Union of North America, Local 527 (Applicant) v. Bradley-Kelly Construction (Utilities) Ltd., 176929 Canada Inc., Bradley-Kelly Construction Ltd., Goodex Equipment Rental Limited (Respondents) *(Withdrawn)*

3254-04-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Fenco Civil Works Corp. a Division of the Foundation Co. of Canada, Foundation Construction & Engineering Company of Canada Corp., Foundation Co. of Canada Limited, Mannix Construction Corp., G.M. Gest Group Ltd., Foundation Construction Company of Canada Corp., 1369550 Ontario Inc., Gestco Systems 2000 Inc., Data-Tel/Fibercom Corporation, G.M. Gest Millenium Corp., L.C. Care Systems Corp., William Conners and Roger Gariepy o/a The Foundation Construction Company (Respondents) *(Granted)*

0257-05-R: Sheet Metal Workers' International Association Local 30 (Applicant) v. Aecon Industrial, Aecon Buildings (Respondents) *(Dismissed)*

0549-05-R: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 900311 Ontario Inc. c.o.b. as Marfran Construction, MTR Group Ltd. o/a MTR Construction, and, 1211384 Ontario Inc. c.o.b. as MTR Construction (Respondents) *(Granted)*

1530-05-R: United Food and Commercial Workers International Union, Locals 175 & 633 (Applicant) v. Grand River Poultry, Grand River Transport (Respondents) *(Withdrawn)*

2987-05-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Walter Gradascevic c.o.b. as City Interior Contracting and, Vahid Gradascevic c.o.b. as City Interior Construction, Redstone Construction Ltd. (Respondents) *(Granted)*

3638-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Terex Earth Services, 1565671 Ontario Ltd. (Respondents) *(Granted)*

3653-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. WJR Refractory Sales and Services Inc., Refractory Resources Ltd. and, Vesuvius Canada Inc. (Respondents) *(Withdrawn)*

3778-05-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Robert Rogers o/a Delta Contracting Co., and, APR Contracting Group Inc. (Respondents) *(Granted)*

4027-05-R: United Food and Commercial International Union, Local 175 (Applicant) v. Schneider Foods, a division of J.M. Schneider Inc., Maple Leaf Consumer Foods Inc.

SALE OF A BUSINESS

0891-02-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Presidential Developments Ltd. and/or, Exeter Developments and/or, Exeter Millennium (Eight Spadina Road) Limited and/or, Exeter Millennium Corporation (Respondents) *(Withdrawn)*

0553-04-R: Labourers' International Union of North America, Local 527 (Applicant) v. Bradley-Kelly Construction (Utilities) Ltd., 176929 Canada Inc., Bradley-Kelly Construction Ltd., Goodex Equipment Rental Limited (Respondents) *(Withdrawn)*

3254-04-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Fenco Civil Works Corp. a Division of the Foundation Co. of Canada, Foundation Construction & Engineering Company of Canada Corp., Foundation Co. of Canada Limited, Mannix Construction Corp., G.M. Gest Group Ltd., Foundation Construction Company of Canada Corp., 1369550 Ontario Inc., Gestco Systems 2000 Inc., Data-Tel/Fibercom Corporation, G.M. Gest Millenium Corp., L.C. Care Systems Corp., William Conners and Roger Gariepy o/a The Foundation Construction Company (Respondents) *(Granted)*

0257-05-R: Sheet Metal Workers' International Association Local 30 (Applicant) v. Aecon Industrial, Aecon Buildings (Respondents) *(Dismissed)*

0549-05-R: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 900311 Ontario Inc. c.o.b. as Marfran Construction, MTR Group Ltd. o/a MTR Construction, and, 1211384 Ontario Inc. c.o.b. as MTR Construction (Respondents) *(Granted)*

1530-05-R: United Food and Commercial Workers International Union, Locals 175 & 633 (Applicant) v. Grand River Poultry, Grand River Transport (Respondents) *(Withdrawn)*

2987-05-R: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Walter Gradascevic c.o.b. as City Interior Contracting and, Vahid Gradascevic c.o.b. as City Interior Construction, Redstone Construction Ltd. (Respondents) *(Granted)*

3615-05-R: Imperial Parking Canada Corporation (Applicant) v. Labourers' International Union of North America, Local 1059, Service Employees International Union, Local 2 (Respondents) *(Granted)*

3638-05-R: International Union of Operating Engineers, Local 793 (Applicant) v. Terex Earth Services, 1565671 Ontario Ltd. (Respondents) *(Granted)*

3653-05-R: Labourers' International Union of North America, Local 1059 (Applicant) v. WJR Refractory Sales and Services Inc., Refractory Resources Ltd. and, Vesuvius Canada Inc. (Respondents) *(Withdrawn)*

3778-05-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Robert Rogers o/a Delta Contracting Co., and, APR Contracting Group Inc. (Respondents) *(Granted)*

4027-05-R: United Food and Commercial International Union, Local 175 (Applicant) v. Schneider Foods, a division of J.M. Schneider Inc., Maple Leaf Consumer Foods Inc. (Respondents) *(Granted)*

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

3943-04-R; 4220-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, Britannia Printers Inc. (Respondents); Graphic Communications International Union/ International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), The Council of Printing Industries of Canada on behalf of Brittania Printers Inc. (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Local 100-G (Intervenor) *(Dismissed)*

3945-04-R; 4217-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Commercial Division, Artcraft Printers (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union, Local 100-M (GCIU, Local 100-M), The Council of Printing Industries of Canada on behalf of Artcraft Printers (Respondents) v. Communications, Energy and Paperworkers Union of Canada, Local 100-G (Intervenor)

4081-04-R; 4325-04-R: Communications, Energy and Paperworkers Union, Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M Specialty Division, Atlas Tag Company of Canada (1979) Inc. (Respondents) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), Atlas Tag Company of Canada (1979) Inc. (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor)

4225-04-R; 4386-04-R: Communications, Energy and Paperworkers Union Local 100-G (Applicant) v. Graphic Communications International Union, Local 100-M, Specialty Division, H.J. Jones-Sons Limited (Respondents) v. Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Intervenor) *(Granted)*; Graphic Communications International Union/International Brotherhood of Teamsters Conference, Local 100-M (GCIU/IBT Conference, Local 100-M) (Applicant) v. Graphic Communications International Union Local 100-M (GCIU, Local 100-M), H. J. Jones-Sons Limited (Respondents) v. Communications, Energy and Paperworkers Union of Canada Local 100-G (Intervenor)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0198-05-R: Jeff Kruger, Jon McAnally, Dave West, Gary Pooran (Applicant) v. GCIU Local 100-M (Respondent) v. Britannia Printers Inc. (Intervenor)

Unit: "all journeymen pressmen, apprentice pressmen, press assistants and apprentices employed by Britannia Printers Inc. in the City of Toronto" (4 employees in unit) *(Dismissed)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

3426-05-R: Sheraton Gateway Hotel Employees Danilo M. Sabado (Applicant) v. UNITE HERE Local 75 (Respondent) v. Sheraton Gateway Hotel (Intervenor)

Unit: "all employees of the Sheraton Gateway Hotel, Toronto International Airport, Terminal 3, Mississauga, Ontario, save and except supervisors, and those above the rank of supervisor, office, clerical, sales and conference services, reservations, communications, security staff, coop students and students employed during the school vacation periods." (195 employees in unit) *(Granted)*

Number of names of persons on revised voters' list	190
Number of persons who cast ballots	153
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	151
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	52
Number of ballots marked against respondent	100
Number of ballots segregated and not counted	0

4118-05-R: Dana Rioux (Applicant) v. Canadian Union of Postal Workers, Local 630 (Respondent) v. Russell A. Farrow Ltd. (Intervenor)

Unit: "all employees of Russell A. Farrow Ltd., in the City of Windsor, save and except supervisors, persons above the rank of supervisor, customs brokers or agents, office, clerical and sales staff." (6 employees in unit) *(Granted)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

4185-05-R: Tay Township outside workers by Brian Phillips (Applicant) v. Local 636 of the International Brotherhood of Electrical Workers (Respondent) v. The Corporation of the Township of Tay (Intervenor)

Unit: "all employees of The Corporation of the Township of Tay, save and except, road/parks superintendent, persons above the rank of road/parks superintendent, utility superintendent, office staff including libraries, hydro staff, temporary contract staff, casual staff, students employed during the school vacation periods and persons covered by the existing collective agreements, geographic location of the unit - based out of 450 Park Street Victoria Harbour." (15 employees in unit) *(Granted)*

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	10
Number of ballots segregated and not counted	0

0001-06-R: Jesse Wood (Applicant) v. United Food and Commercial Workers Union Local 175 (Respondent) v. 564069 Ontario Inc. (c.o.b. as Newcastle IGA) (Intervenor)

Unit: "all employees of 564069 Ontario Inc., c.o.b. as I.G.A. Newcastle employed at 131 King Street East, Village of Newcastle in the Municipality of Clarington, save and except department managers, persons above the rank of department managers, head cashier and office and clerical staff" (63 employees in unit) *(Dismissed)*

Number of names of persons on revised voters' list	72
Number of persons who cast ballots	60
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	30
Number of ballots marked against respondent	30
Number of ballots segregated and not counted	0

0180-06-R: Ahmed Momen (Applicant) v. United Steelworkers of America Local 4153 (Respondent) v. IKO Industries Ltd (Intervenor) *(Granted)*

0206-06-R: Carriere Foods Inc. Ontario (Applicant) v. Teamster's Union Local #879 (Respondent) *(Dismissed)*

REFERRAL FROM MINISTER (SECTION 115)

3205-05-M: Warehousemen, Transportation and General Workers Union, Local 715 (Applicant) v. Evans Lumber and Builders Supply Limited (Respondent) *(Granted)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0927-03-U: L'Association des enseignantes et des enseignants franco-ontariens (Applicant) v. Le Conseil scolaire de district catholique Franco-Nord (Respondent) *(Withdrawn)*

0257-04-U: United Food and Commercial Workers International Union, Local 206 (Applicant) v. Sheprott K-9 Security Inc. (Respondent) *(Withdrawn)*

0815-04-U: Public Service Alliance of Canada (Applicant) v. Georgian Downs Limited (Respondent) *(Withdrawn)*

0902-04-U: Canadian Union of Public Service Employees, Local 4186 (Applicant) v. London District Catholic School Board (Respondent) v. J & A Building Services Ltd., Labourers' International Union of North America, Local 1059, Service Master Cleaning of London (Intervenors) *(Withdrawn)*

3520-04-U: Canadian Union of Public Employees Local 3626 (Applicant) v. Windsor Essex Community Care Access Centre (Respondent) *(Withdrawn)*

3687-04-U: Ken Wedgewood (Applicant) v. International Association of Machinists and Aerospace Workers, 717T (Respondent) v. Orenda Aerospace Corporation (Intervenor) *(Dismissed)*

4002-04-U; 4089-04-U: The Ontario Secondary School Teachers' Federation and its District 12 PSSP Unit (Applicant) v. Toronto District School Board and David Reid (Respondent) *(Withdrawn)*

4274-04-U: Christine E. Sidlar (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Crown in Right of Ontario (Ministry of the Attorney General) (Intervenor) *(Withdrawn)*

4352-04-U: Ontario Public Service Employees Union (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as Woodbine Racetrack Slots (Respondent) *(Withdrawn)*

0128-05-U: Kamal Saad (Applicant) v. Brewery, General and Professional Workers Union (Respondent) v. University Health Network (Intervenor)

0319-05-U: Jan-Lee Mckenzie Hughes-Haycock (Applicant) v. Canadian Union of Public Employees Local 4654 (Respondent) v. Central Care Corporation operating as Hillside Manor (Intervenor) *(Dismissed)*

0904-05-U: Ontario Public Services Employees' Union (Applicant) v. Ontario Patient Transfer (Respondent) *(Withdrawn)*

0968-05-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Anishnawbe Mushkiki Community Health Centre (Respondent) v. Native Leasing Services (Intervenor) *(Withdrawn)*

1162-05-U: Communications, Energy and Paperworkers Union, Local 2003 (Applicant) v. General Motors of Canada Limited (Respondent) *(Withdrawn)*

1211-05-U: Ontario Public Service Employees Union (Applicant) v. Region of Peel Emergency Medical Services (Respondent) *(Withdrawn)*

1245-05-U: Andy Harabulya (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 9042 (Respondent) v. TNT Canada Inc. (Intervenor) *(Dismissed)*

1423-05-U: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and Brad Vandale (Applicant) v. 510974 Ontario Limited cob as Continental Insulation (Respondent) *(Withdrawn)*

1532-05-U: United Food and Commercial Workers International Union, Locals 175 & 633 (Applicant) v. Grand River Transport (Respondent) *(Withdrawn)*

1758-05-U: Greely Construction Ltd. (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) v. NCI Ottawa Inc. (Intervenor) *(Withdrawn)*

1879-05-U: Christine E. Sidlar (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Crown in Right of Ontario (Ministry of the Attorney General) (Intervenor) *(Withdrawn)*

1978-05-U: Jim Marrone (Applicant) v. Ontario English Catholic Teachers Association (Respondent) v. Niagara Catholic District School Board (Intervenor) *(Withdrawn)*

2164-05-U: Lorne Gordon (Applicant) v. Ontario Public Service Employees Union (Respondent) *(Dismissed)*

2310-05-U: Aspi Elavia (Applicant) v. Canadian Union of Public Employees, Local 148 (Respondent) v. The City of Greater Sudbury (Intervenor) *(Dismissed)*

2615-05-U: Teamsters Local Union 847 (Applicant) v. A. Berger Precision Ltd. (Respondent) *(Withdrawn)*

2700-05-U: Janesse Talbot (Applicant) v. CAW Local 2458 (Respondent) v. Windsor Place (Central Corp.) (Intervenor) *(Dismissed)*

2810-05-U: Ontario Public Service Employees Union (Applicant) v. South Bruce Grey Health Centre (Respondent) *(Withdrawn)*

2853-05-U: Ruth Dianne Marshall (Applicant) v. Ontario Public Service Employees Union (Respondent) v. West Parry Sound Health Centre (Intervenor) *(Withdrawn)*

3057-05-U: Robert Lake (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario, as represented by the Ministry of Community Safety & Correctional Services (Intervenor) (Intervenor)

3074-05-U: Hien Nguyen (Applicant) v. Service Employees International Union Local 1.on (Respondent) v. University Health Network (Intervenor) *(Dismissed)*

3187-05-U: Ashagrie Getahun (Applicant) v. Canadian Union of Public Employees, Local 2770 (Respondent) v. Extendicare (Canada) Inc. (Intervenor) *(Dismissed)*

3207-05-U: Amalgamated Transit Union, Local 113 and Danial Marrier (Applicant) v. Toronto Transit Commission (Respondent) *(Withdrawn)*

3284-05-U: Louise Reynen (Applicant) v. Waterloo Catholic District School Board (WCDSB) (Respondent) *(Withdrawn)*

3394-05-U: Victor Roukoz (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) and Local 1688 (Respondent) *(Withdrawn)*

3399-05-U: Vivienne Donaldson (Applicant) v. Service Employees International Union (Respondent) *(Withdrawn)*

3414-05-U: International Association of Machinists and Aerospace Workers Thunder Bay Lodge 1120 (Applicant) v. Badanai Motors Ltd., Dominion Motors (Thunder Bay-1984) Limited (Respondents) *(Withdrawn)*

3434-05-U: Jyoti Mehta (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 414 (Respondent) v. 407 ETR Concession Company Limited (Intervenor) *(Withdrawn)*

3435-05-U; 3618-05-U: United Food and Commercial Workers Union Local 175 (Applicant) v. Young Star House, a Division of 865292 Ontario Limited (Respondent); Young Star House, a Division of 865292 Ontario Limited (Applicant) v. United Food & Commercial Workers Union, Local 175 (Respondent) *(Withdrawn)*

3521-05-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Ottawa Marriott Hotel (Respondent) *(Withdrawn)*

3532-05-U: Maria Mendonca (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) *(Withdrawn)*

3581-05-U: Alexei Krouchinski (Applicant) v. United Food & Commercial Workers Local 206 (Respondent) *(Withdrawn)*

3611-05-U: David Voutour (Applicant) v. United Steelworkers, Local 1-2693 (Respondent) *(Withdrawn)*

3692-05-U: Brian Jolicoeur (Applicant) v. Canadian Union of Public Employees, Local 1734 (Respondent) *(Withdrawn)*

3695-05-U: Ann Charles (Applicant) v. United Steelworkers of America, Local 3950-74 (Respondent) v. NRI Industries Inc. (Intervenor) *(Withdrawn)*

3714-05-U: Marie-Hélène Bélance (Applicant) v. Syndicat canadien de la fonction publique (Respondent) v. Association pour l'intégration sociale d'Ottawa (Intervenor) *(Withdrawn)*

3721-05-U: Patrick Puhakka (Applicant) v. Canadian Union of Public Employees Local 127 (Respondent) v. Town of Cobalt (Intervenor) *(Withdrawn)*

3760-05-U: Roy Sutton (Applicant) v. United Food and Commercial Workers Canada Locals 175 & 633 (Respondent) *(Dismissed)*

3768-05-U: Angela Flint (Applicant) v. United Food & Commercial Workers Locals 175 & 633 (Respondent) *(Withdrawn)*

3896-05-U: Joe Ciccarelli (Applicant) v. United Food & Commercial Workers Canada Locals 175 & 633 (Respondent) v. The Great A&P Company of Canada (Intervenor) *(Withdrawn)*

3907-05-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. PRW Excavating Contractors Ltd. (Respondent) *(Dismissed)*

3948-05-U: Canadian Union of Public Employees, Local 79 (Applicant) v. The City of Toronto (Respondent) *(Withdrawn)*

3960-05-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Baun Construction Inc. (Respondent) *(Withdrawn)*

4001-05-U: Paula Tavares (Applicant) v. Amalgamated Transit Union Local 1624 (Respondent) *(Dismissed)*

4029-05-U: Larena Smith (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 414 (Respondent) *(Withdrawn)*

4034-05-U: Canadian Office and Professional Employees Union, Local 343 (Applicant) v. Twin Oak Credit Union Limited (Respondent) (Intervenor)

4038-05-U: James Hart (Applicant) v. Trader Media Corporation and, Yellow Pages Group Inc. (Respondents) *(Withdrawn)*

4131-05-U: Labourers' International Union of North America, Local 1089 (Applicant) v. 646849 Ontario Ltd., c.o.b. as Magic Maid Cleaning Service (Respondent) *(Withdrawn)*

4155-05-U: Piara Singh Saini (Applicant) v. CAW Local 40 (Respondent) *(Dismissed)*

4179-05-U: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. International Brotherhood of Electrical Workers (Respondent) v. Guild Electric Limited
(Intervenor) *(Granted)*

4190-05-U: Wade Hill (Applicant) v. C.A.W. Union Local 252 (Respondent) v. Cryovac Sealed Air of Canada (Intervenor) *(Withdrawn)*

4254-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Ultraframe (North America) Ltd. (Respondent) *(Withdrawn)*

4303-05-U: Canadian Union of Public Employees and its Local 4773 (Applicant) v. Canadian Memorial Chiropractic College (Respondent) *(Withdrawn)*

0045-06-U: Eastern Ontario Volunteer Firefighters Association, Local 920 affiliated with Christian Labour Association of Canada (Applicant) v. The Corporation of the Town of Midland (Respondent) *(Withdrawn)*

APPLICATION FOR INTERIM ORDER

2307-05-M: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Marshall Homes Corporation and/or Marshall Homes (Copperfield) Ltd. (Respondent) *(Dismissed)*

3955-05-M: Sheet Metal Workers' International Association Local Union 47, Rene Courtemanche and Jordan Simpson (Applicant) v. Hydracorp Canada Ltd., Gary Bekolay and Jeff Brown (Respondent) *(Endorsed Settlement)*

3959-05-M: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Baun Construction Inc. (Respondent) *(Withdrawn)*

4137-05-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Mudges (E.) Appliance & Service Shop (Wharncliffe) (Respondent) *(Withdrawn)*

4252-05-M: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Ultraframe (North America) Ltd. (Respondent) *(Withdrawn)*

4307-05-M: International Brotherhood of Electrical Workers (Applicant) v. International Brotherhood of Electrical Workers, Local Union No. 1739 (Respondent) v. Guild Electric Limited (Intervenor) *(Dismissed)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0093-06-M: Loeb Canada Inc. c/o as Loeb March Road (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

4064-05-JD: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers and its Local 736 (Applicant) v. Bruce Power LP and, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Respondents) *(Withdrawn)*

4076-05-JD: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and its Local 721 (Applicant) v. Comstock Canada Ltd., International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Respondents) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1450-05-M: Ontario Public Service Staff Union (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Administrative Staff Union (Intervenor) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2702-05-OH: Ruth Dianne Marshall (Applicant) v. West Parry Sound Health Centre (Respondent) v. Workplace Safety and Insurance Board (Intervenor) *(Withdrawn)*

2848-05-OH: Kurt Wright (Applicant) v. Herman Pinto (Respondent) *(Dismissed)*

3237-05-OH: Curtis Steeves (Applicant) v. General Electric Canada Incorporated (Respondent) *(Withdrawn)*

3332-05-OH: Charles Stewart Edwards (Applicant) v. Centrex Warehouse and Logistics Inc. (Respondent) *(Granted)*

3452-05-OH: Greg Flett (Applicant) v. CTF Supply Ltd. (Respondent) (Intervenor)

3527-05-OH: Christopher A. Lane (Applicant) v. I.C.R. Canada Corp. (Respondent) *(Dismissed)*

3753-05-OH: Jocelyne Helene Vaillancourt (Applicant) v. William Osler Health Centre (Respondent) *(Withdrawn)*

3914-05-OH: Brian Leblanc (Applicant) v. Hamilton-Wentworth Detention Centre (Respondent) *(Withdrawn)*

3941-05-OH: Steve Starfield (Applicant) v. Winter Festival of Lights and, HRDC (Service Canada) (Respondents) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

0950-01-G; 1587-01-G: United Brotherhood of Carpenters and Joiners of the United States and Canada, Local 2041 (Applicant) v. Nation Drywall Contractors Ltd. (Respondent); Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 124 (Applicant) v. Nation Drywall Limited (Respondent) *(Endorsed Settlement)*

0140-04-G; 0173-04-G; 0174-04-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Flynn Canada Ltd. (Respondent); Sheet Metal Workers' International Association, Local 473 (Applicant) v. Flynn Canada Ltd. (Respondent) *(Withdrawn)*

3336-04-G; 3337-04-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Advance Drywall Ltd. (Respondent) (Intervenor)

0046-05-G: Labourers' International Union of North America, Local 1036 (Applicant) v. R.M. Belanger Limited (Respondent) (Intervenor)

0256-05-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Aecon Industrial, Aecon Buildings (Respondents) *(Dismissed)*

0508-05-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Saberwood Homes (Respondent) *(Withdrawn)*

2304-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, and Iron Workers' District Council of Ontario on its own behalf and on behalf of its Locals 721 and 736 (Applicant) v. Sunrise Construction and Custom Welding (Respondent) *(Endorsed Settlement)*

3460-05-G: International Union of Elevator Constructors, Local 50 (Applicant) v. ThyssenKrupp Elevator (Canada) Limited (Respondent) *(Withdrawn)*

3660-05-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. (Respondent) *(Granted)*

3763-05-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 (the "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. MBC Concrete Forming Inc. (Respondent) *(Granted)*

3887-05-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Panels and Pipes Incorporated (Respondent) *(Endorsed Settlement)*

3894-05-G: International Union of Operating Engineers, Local 793 (Applicant) v. 1042017 Ontario Ltd. o/a T.J. Enterprises (Respondent) *(Granted)*

3930-05-G: Labourers' International Union of North America, Local 625 (Applicant) v. LaSalle Backhoe Service (Respondent) *(Withdrawn)*

4175-05-G: United Brotherhood of Carpenters and Joiners of America, Local Union 1946 (Applicant) v. Architectural Millwork & Door Installations Inc. (Respondent) *(Withdrawn)*

4196-05-G; 3907-05-G: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. PRW Excavating Contractors Ltd. (Respondent) *(Dismissed)*

4211-05-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 18 (Applicant) v. JDR Construction (1994) Inc. (Respondent) *(Endorsed Settlement)*

4214-05-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 2486 (Applicant) v. 3404994 Canada Inc., o/a Prisma Construction (Respondent) *(Withdrawn)*

4229-05-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Symtech Innovations Ltd. (Respondent) *(Endorsed Settlement)*

4230-05-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. EBF Mechanical Inc. (Respondent) *(Granted)*

4245-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Golden Drywall Ltd. (Respondent) *(Withdrawn)*

4246-05-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Goldcrest Interior Contractors Inc. (Respondent) *(Granted)*

4249-05-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Angus Samspon c.o.b. as A&B Holding (Respondent) *(Endorsed Settlement)*

4256-05-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 1096748 Ontario Ltd. c.o.b. as Power Station Construction (Respondent) *(Endorsed Settlement)*

4257-05-G: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. 1096748 Ontario Ltd. c.o.b. as Power Station Construction (Respondent) *(Endorsed Settlement)*

4306-05-G: 1210166 Ontario Ltd. (c.o.b. D.C.C. Carpentry) (Applicant) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Granted)*

0013-06-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Windsor Glass Company (1992) Limited (Respondent) *(Granted)*

0015-06-G; 0016-06-G: Construction Workers Local 52 affiliated with the Christian Labour Association of Canada (Applicant) v. AW High Voltage Contracting Limited (Respondent) *(Withdrawn)*

0032-06-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Jacobs Catalytic Ltd. (Respondent) *(Withdrawn)*

0058-06-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. T.F. Structures Group Inc. (Respondent) *(Granted)*

0060-06-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. DG Limited (Respondent) *(Withdrawn)*

0090-06-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Superior Roofing and Sheet Metal (Respondent) *(Granted)*

0112-06-G: Drywall Acoustic Lathing and Insulation Local Union 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bob's Drywall Ltd. (Respondent) *(Endorsed Settlement)*

0126-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sava Contracting Inc. and, Ilie Sava (Respondents) *(Withdrawn)*

0210-06-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. The State Group Inc. (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

3076-03-ES: Vincent Morgan (Applicant) v. Casino Rama Services Inc. and, Director of Employment Standards (Respondents) (Intervenor)

3856-03-ES: 277 St. George Street Limited o/a Nick Detoro Racing Stable (Applicant) v. Robert Backlund, Jennifer Baksh and, Director of Employment Standards (Respondents) (Intervenor)

0384-04-ES: Ildiko Parniczky (Applicant) v. Paramount Rehabilitation Centre Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

2222-04-ES; 2223-04-ES; 2224-04-ES: Novaquest Finishing Inc. (Applicant) v. Abdurahman Abdoulrab, Josephine Andres, et al, Director of Employment Standards (Respondents); Catelectric Inc. (Applicant) v. Abdurahman Abdoulrab, Josephine Andres, et al, Director of Employment Standards (Respondents); 4064186 Canada Inc. (Applicant) v. Abdurahman Abdoulrab, Josephine Andres, et al, Director of Employment Standards (Respondents) *(Dismissed)*

3407-04-ES: Anand Bishnoram (Applicant) v. Wallcrown Limited and, Director of Employment Standards (Respondents) *(Dismissed)*

3902-04-ES: Craig Jull (Applicant) v. Manderley Corporation and, Director of Employment Standards (Respondents) *(Dismissed)*

3997-04-ES: Hamsa Ibramhim (Applicant) v. Ingoglia Supermarket Ltd., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0048-05-ES: Marc Barrette (Applicant) v. Rainbow Concrete Industries Ltd. and, Director of Employment Standards (Respondents) *(Granted)*

0357-05-ES: Mr. Maxwell Obanna & Mrs. Rose Obanna (Applicant) v. Ms. Funmilayo Oladapo and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0395-05-ES; 0396-05-ES: Gregory U. Voisin, a Director of Schooley Mitchell Franchise Corp. (Applicant) v. Tanya Martin, Cathy Brown-Swanton, Rick Delaney, Suzanne Terpstra, Teresa Tyler, Janice Richardson, Kimberley Hern, Brad Doyley, Pamela Duskocy, Kelvin Martin and, Director of Employment Standards (Respondents); Gregory U. Voisin, a Director of Schooley Mitchell Franchise Corp. (Applicant) v. Glenn E. Cressman, Alison Znidarsic, Barb M. Reid, Debra E. Sallows, Sherrie L. Thorne, Laurie J. Knechtel, Michael J. Ashton, Wilhelmina J. Krueger, William J. McNichol, Dianne M. Rounds, Patrick Gosselin, Melanie A. Dow, Jennifer L. Eaton, Mellissa M. Hughes, Brett M. Nelson, Derek A. Atkins, Brenda D. McCarthy, James D. Channer and, Director of Employment Standards (Respondents) *(Granted)*

0833-05-ES: Ken Phu (Applicant) v. Downtown Mazda and, Director of Employment Standards (Respondents) *(Withdrawn)*

1174-05-ES: Dina M. Danial (Applicant) v. Zellers Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1276-05-ES: Stephen Lowe (Applicant) v. Itech Precision Cleaning Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1284-05-ES: Sherwood Dash Inc. (Applicant) v. Natasha Henry, and, Director of Employment Standards (Respondents) *(Granted)*

1426-05-ES: Sandra Knapp (Applicant) v. Hildachan Solutions Canada o/a Ethnic Shopping and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1860-05-ES: Ali Amzad (Applicant) v. Tom Jones Steak House, and, Ministry of Labour (Respondents) *(Dismissed)*

1954-05-ES: Premita Chand (Applicant) v. Mother Parker's Tea & Coffee Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1958-05-ES: Norma Dunn (Applicant) v. La Felicita Bakery & Restaurant Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

2046-05-ES: Manitoulin Builders Co. (Applicant) v. Tate Shank and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2047-05-ES: Irene McCutcheon (Applicant) v. Doubleday Canada Limited and (Respondent) *(Endorsed Settlement)*

2078-05-ES: Donovan Barrcyt (Applicant) v. The Brick Warehouse Corporation and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2080-05-ES: Leonard Brian Law (Applicant) v. Yum Brands and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2110-05-ES: Muhammad Jamil Khattak (Applicant) v. Keromena Holdings Ltd. and, Director of Employment Standards (Respondents) *(Granted)*

2134-05-ES: Jennifer Concepcion (Applicant) v. Ontario Family Guidance Centre Inc., Director of Employment Standards (Respondents) *(Withdrawn)*

2144-05-ES: Mariusz Pental (Applicant) v. P.A. Rutherford Pharmacy Ltd. and, Director Of Employment Standards (Respondents) *(Withdrawn)*

2202-05-ES: Michael Jeremiah (Applicant) v. The Bankruptcy of Richtree Markets Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2271-05-ES: Chris Keskeny (Applicant) v. Elite Performance Products and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2315-05-ES: Cryderman Insurance Brokers Ltd. (Applicant) v. Risa Dee Andersen and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2342-05-ES: Condie Pontiac Buick Ltd. (Applicant) v. Douglas Clarke and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2346-05-ES: Robert Casagrande (Applicant) v. Rose City Asphalt Repair and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2491-05-ES: Abdul Basir Popalzaie (Applicant) v. Organized Interiors McDoors & Closets Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2533-05-ES: Michelle Kathleen Boich (Applicant) v. 3 for 1 Great Glasses and, Director of Employment Standards (Respondents) *(Granted)*

2574-05-ES: Richard J. Pollitt (Applicant) v. Noco Canada Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

2632-05-ES: Global Courier & Messenger Services Ltd. (Applicant) v. Mr. Sandeep Brar and, Director of Employment Standards (Respondents) *(Granted)*

2639-05-ES: 1188610 Ontario Ltd. o/a Nipigon Esso Restaurant (Applicant) v. Holly Monteith and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2759-05-ES: Benjamin Ponce (Applicant) v. Majestic Plastics Limited, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2777-05-ES: Pestell Pet Products Inc. (Applicant) v. Ken Clark and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2818-05-ES: Image Craft Inc. (Applicant) v. Soraya White, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2856-05-ES: Pranvera Zhuta (Applicant) v. Ontario Securities Commission and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2867-05-ES: Karen Chase (Applicant) v. Windsor Racetrack Slots and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2902-05-ES: Daniel O. Sifontes (Applicant) v. Aaon Canada Inc. operating as Air Wise and, Director of Employment Standards (Respondents) *(Dismissed)*

3024-05-ES: Singaravelu Ganapathi (Applicant) v. 687203 Ontario Limited o/a La Rocca Creative Cakes and, Director of Employment Standards (Respondents) *(Withdrawn)*

3040-05-ES: Danny Walsh (Applicant) v. Costco Wholesale Canada Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3163-05-ES: Collectcorp Inc. (Applicant) v. Donna Ree James, Director of Employment Standards (Respondents) *(Withdrawn)*

3208-05-ES; 3209-05-ES; 3318-05-ES: Track-Corp Equipment Ltd. (Applicant) v. William Gibson and, Director of Employment Standards (Respondents); Track-Corp Equipment Ltd. (Applicant) v. Rennie Deamicis and, Director of Employment Standards (Respondents); Track-Corp Equipment Ltd. (Applicant) v. Maurice Ferron and, Director of Employment Standards (Respondents) (Intervenor)

3212-05-ES: Yi Liu (Applicant) v. Metro Toronto News Company and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3250-05-ES: 1504719 Ontario Inc. t/a Bingo Country (Finch) (Applicant) v. Doris Casey and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3280-05-ES: Greg Walker (Applicant) v. Home Depot of Canada Incorporated, Director of Employment Standards (Respondents) (Intervenor)

3371-05-ES: Jing You (Applicant) v. Shear Illusions and the Ultimate Cut, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3390-05-ES: Active Kidz Daycare Centre Inc. (Applicant) v. Shawna Herman and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3578-05-ES: A.R.D. Industries Ltd. (Applicant) v. Noel Guenard, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3604-05-ES: Douglas J. Snelgrove (Applicant) v. Bridgeview Marina (Captain's Yachting) and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3605-05-ES: Steve Percival (Applicant) v. Bridgeview Marina (Captain's Yachting) and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3609-05-ES: Heritage Janitorial (Applicant) v. Eddie Merling, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3644-05-ES: Snowman A Division of 1488573 Ontario Inc. (Applicant) v. Dave Parsons and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3655-05-ES: Karen D'Agostino a Director of Battlefield Electric Ltd. (Applicant) v. Len Best and, Director of Employment Standards (Respondents) (Intervenor)

3689-05-ES: Pizza Picco (Applicant) v. Guiseppe Cavallieri and, Director of Employment Standards (Respondents) *(Withdrawn)*

3717-05-ES: 626658 Ontario Inc. o/a He & She Hairstyling (Applicant) v. Shannon McFaul and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3756-05-ES: Ali Ghalem (Applicant) v. Cross Roads Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3775-05-ES: Southern Sanitation Inc. (Applicant) v. Manuel F. Damasio and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3837-05-ES: Huong Huynh (Applicant) v. Bayshore Home Health and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3883-05-ES: Dan Hogan (Applicant) v. C.J. Tremblay Investments Inc. o/a Canadian Tire (Store #241), Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3900-05-ES: Reed Construction Data Inc. (Applicant) v. Grant Cameron and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3904-05-ES: Southside Johnny's Bar and Grill (Applicant) v. Ms. Sarah Fuller and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3908-05-ES: Ambutrans Inc. (Applicant) v. Shawn Redman and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3947-05-ES: 1008623 Ontario Inc. o/a Tim Horton's (Applicant) v. Joanne Travers and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3988-05-ES: Ajindrapal Singh and Rajesh Chowdhry, Directors of Ajendi Technologies Inc. Netbusmodel Inc. Info-Plex Telenterprises Inc. (Applicant) v. Danilo Djokic, Daryl Jones, Dean Pezderic, John Henrick, Richard JP Ricketts, Ajay Lekhi, Baljeet K. Atwal, Joginder Pal, Mahesh Achtani, Payal Pal, Sangeeta Achtani, Romulo Velasquez, Maksim Rogov and, Director of Employment Standards (Respondents) (Intervenor)

3989-05-ES: Nienkamper Furniture & Accessories Inc. (Applicant) v. Razvan Anghel and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4004-05-ES: Pocketz Pita Company Inc. (Applicant) v. Kristin French and, Director of Employment Standards (Respondents) *(Dismissed)*

4005-05-ES: Pocketz Pita Company Inc. (Applicant) v. Kyle Boyce and, Director of Employment Standards (Respondents) *(Dismissed)*

4016-05-ES; 4275-05-ES: Allied International Credit Corp./Societe Internationale De Recouvrement Allied Inc. (Applicant) v. Julie Ingoe, Director of Employment Standards (Respondents); Julie Ingoe (Applicant) v. Allied International Credit Corp./Societe Internationale De Recouvrement Allied Inc., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4024-05-ES: Tony S. Leung (Applicant) v. Sam's Club a Division of Wal-Mart Canada Corp. and, Director of Employment Standards (Respondents) *(Dismissed)*

4047-05-ES: Mark Maticka (Applicant) v. Homeshow Canada (currently known as The Brick Superstore) and, Director of Employment Standards (Respondents) *(Withdrawn)*

4049-05-ES: Associated Packaging Enterprises Canada Inc. (Applicant) v. Chris Checkley and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4058-05-ES: Pargass Haripersaud (Applicant) v. Director of Employment Standards (Respondent) (Intervenor)

4111-05-ES: 1131003 Ontario Inc. o/a MD Products Inc. (Applicant) v. Ralph Nelles and, Director of Employment Standards (Respondents) (Intervenor)

4235-05-ES: Daniel Place (Applicant) v. New Generation Pizza & Chicken and, Director of Employment Standards (Respondents) *(Dismissed)*

4285-05-ES: Donna Bayes O/A Avenue East (Applicant) v. Katherine Convey and, Director of Employment Standards (Respondents) *(Dismissed)*

0022-06-ES: George Anthony Hoyland (Applicant) v. Canadian Corps of Commissionaires (Hamilton), Director of Employment Standards (Respondents) *(Dismissed)*

0110-06-ES: Sharon Navaratne (Applicant) v. Fit for Life and, Director of Employment Standards (Respondents) *(Withdrawn)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

0966-00-HS; 2311-00-HS: Ontario Public Service Employees' Union (Applicant) v. Ministry of Transportation, Ministry of Labour (Respondents); Ontario Public Service Employees' Union (Applicant) v. The Crown In Right of Ontario (Ministry of Transportation), Ministry of Labour (Respondents) *(Granted)*

2810-04-HS; 3594-04-HS: Amalgamated Transit Union, Local 113 (Applicant) v. Toronto Transit Commission, David Bell, Inspector (Respondents); Amalgamated Transit Union, Local 113 (Applicant) v. Toronto Transit Commission, Ministry of Labour (Respondents) *(Withdrawn)*

2798-05-HS: Pepsi Bottling Group (Canada) Co. (Applicant) v. United Food & Commercial Workers International Union, Lou Parco, Inspector (Respondents) *(Withdrawn)*

3349-05-HS: Enclosures Direct Inc. (Applicant) v. Joanne Noonan, Inspector (Respondent) *(Endorsed Settlement)*

3631-05-HS: Street Cartage Limited (Applicant) v. Ministry of Labour and Dennis Wilson, Inspector (Respondent) (Intervenor)

3975-05-HS: Black & McDonald Limited (Applicant) v. UA Local 71 and, Jean Justa, Inspector (Respondents) *(Withdrawn)*

4116-05-HS: EllisDon Corporation (Applicant) v. Sebastien Levert, Claude Cadieux, Denis Lalonde, Wendy Gobeil, Inspector (Respondents) *(Withdrawn)*

PAY EQUITY ACT

2227-05-PE: Algoma District School Board (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2764-03-G: Labourers' International Union of North America, and The Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Hydro One Inc. (Respondent) v. Universal Workers Union, L.I.U.N.A. Local 183 (Intervenor) *(Dismissed)*

3993-04-ES: Daniel Pambrun (Applicant) v. Remisys Corporation and, Directeur des normes d'emploi (Respondents) *(Dismissed)*

1410-05-R: Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Glasbau Hahn GmbH + Co. KG (Respondent) *(Dismissed)*

2682-05-ES: Heather A. Chadwick (Applicant) v. Zale Canada Co. dba Peoples Jewellers, Director of Employment Standards (Respondents) *(Dismissed)*

3194-05-ES: Razavi Enterprises (Carlingwood) Ltd. o/a Nutrition House (Applicant) v. Richard Green and, Director of Employment Standards (Respondents) *(Dismissed)*

3627-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. PRW Excavating Contractors Ltd. (Respondent) *(Dismissed)*

3951-05-ES: Sylvie Brochu (Applicant) v. District School Board Ontario North East, Director of Employment Standards (Respondents) *(Dismissed)*

0206-06-R: Carriere Foods Inc. Ontario (Applicant) v. Teamster's Union Local #879 (Respondent) *(Dismissed)*

CASE LISTINGS MAY 2006

PAGE

1. Applications for Certification 175
2. Applications for Declaration of Related Employer 186
3. Sale of a Business 186
4. Union Successor Rights 186
5. Applications for Declaration Terminating Bargaining Rights 186
6. Applications for Declaration of Unlawful Strike 188
7. Applications for Declaration of Unlawful Strike (Construction Industry) 188
8. Complaints of Unfair Labour Practice 188
9. Applications for Interim Order 192
10. Applications for Consent to Prosecute 192
11. Jurisdictional Disputes 192
12. Applications for Determination of Employee Status 192
13. Complaints under the Occupational Health and Safety Act 193
14. Construction Industry Grievances 193
15. Appeals – Employment Standards Act 195
16. Appeals – Occupational Health and Safety Act 200
17. Applications for Reconsideration of Board's Decision 201
18. Applications for Accreditation 201

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 2006

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3138-05-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 6364144 Canada Inc. carrying on business as ICI Construction Management (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 6364144 Canada Inc. carrying on business as ICI Construction Management in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of 6364144 Canada Inc. carrying on business as ICI Construction Management in all sectors of the construction industry in the City of Ottawa, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

3743-05-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Langlois Construction and Design Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Langlois Construction and Design Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Langlois Construction and Design Ltd. in all sectors of the construction industry in the County of Renfrew, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

4268-05-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Whitmore Interiors Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Whitmore Interiors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Whitmore Interiors Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0237-06-R: Labourers' International Union of North America, Local 625 (Applicant) v. Lakeside Pools and Concrete (Respondent)

Unit: "all construction labourers in the employ of Lakeside Pools and Concrete in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all construction labourers in the employ of Lakeside Pools and Concrete in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0318-06-R: Sheet Metal Workers' International Association Local Union No. 47 (Applicant) v. Commercial Roofing Inc. (Respondent)

Unit: "all roofers and roofers' apprentices in the employ of Commercial Roofing Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all roofers and roofers' apprentices in the employ of Commercial Roofing Inc. in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

0326-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. HugoMark Construction (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment and those primarily engaged in the repairing or maintaining of same and employees engaged as surveyors in the employ of HugoMark Construction in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0382-06-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. P. Menard Electric Inc. and G.P.L. Holdings Limited and Menard Electric (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of P. Menard Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of P. Menard Electric Inc. in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

0399-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Dowdall Crane Service (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Dowdall Crane Service in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Dowdall Crane Service in all sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0423-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Marco Polo Painting and Decorating Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Marco Polo Painting and Decorating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of Marco Polo Painting and Decorating Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0467-06-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bolton View Carpentry Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Bolton View Carpentry Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Bolton View Carpentry Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

0489-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. George Brunetta c.o.b. as Essa Drywall (Respondent)

Unit: "all painters and painters' apprentices in the employ of George Brunetta c.o.b. as Essa Drywall in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all painters and painters' apprentices in the employ of George Brunetta c.o.b. as Essa Drywall, in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0551-06-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Pancras Building Maintenance Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Pancras Building Maintenance Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all painters and painters' apprentices in the employ of Pancras Building Maintenance Inc., in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working-foreman" (6 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0102-06-R: Ontario Nurses' Association (Applicant) v. Muskoka East Parry Sound Health Services CCAC (Respondent) v. Ontario Public Service Employees Union (Intervenor)

Unit: "all Case Managers and Placement Coordinators employed by the Muskoka East Parry Sound Health Services in its Community Care Access Centre, save and except supervisors, persons above the rank of supervisor and persons in positions for which another trade union held bargaining rights as of April 11, 2006" (48 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

0103-06-R: Service Employees International Union Local 2.on Brewery, General and Professional Workers Union (Applicant) v. Winrac Development Inc. o/a Woodstock Raceway (Respondent)

Unit: "all employees of Winrac Development Inc. o/a Woodstock Raceway, employed in the City of Woodstock, save and except supervisors, persons above the rank of supervisor, office and clerical, security guards (parking lot attendants), tote operators, race office clerks, black-smiths, starters, assistant paddock judges, and runner/timers" (17 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

0140-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Henry Company Canada, Inc. (Respondent)

Unit: "all employees of Henry Company Canada, Inc., in the City of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, quality control, office, clerical, research & development, sales staff and students employed during the school vacation period" (50 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	0

0142-06-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Focus Young Adult Addiction Service carrying on business as Breakaway (Respondent)

Unit: "all employees of Focus Young Adult Addiction Service carrying on business as Breakaway, in the City of Toronto, save and except Office Manager, Supervisors, persons above the rank of Supervisor, Office and Clerical Staff and Satellite staff" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0156-06-R: Retail, Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Applicant) v. Sodexho MS Canada Limited (Respondent)

Unit: "all employees of Sodexho MS Canada Limited at Nav Canada Training Institute and Conference Centre at 1950 Montreal Road, Cornwall, Ontario, save and except supervisors, those above the rank of supervisor, instructors, executive chef, sous-chef and administrative office personnel" (181 employees in unit)

Number of names of persons on revised voters' list	248
Number of persons who cast ballots	145
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	136
Number of segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	76
Number of ballots marked against applicant	63
Number of ballots segregated and not counted	6

0204-06-R: Ontario Federation of Health Care Workers, Labourers' International Union of North America, Local 1110 (Applicant) v. Nutra Services Inc. (Respondent)

Unit: "all employees of Nutra Services Inc. employed at the Manitoulin Lodge, in the Town of Gore Bay, Ontario, save and except supervisors and persons above the rank of supervisor (12 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0275-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Ontario Lottery & Gaming Corporation c.o.b. as Brantford Charity Casino (Respondent)

Unit: "all employees of Ontario Lottery & Gaming Corporation c.o.b. as Brantford Charity Casino in Brantford, Ontario, save and except supervisors and those above the rank of supervisor, human resources, office and clerical staff, security and surveillance officers" (760 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list 718	
Number of persons who cast ballots	622
Number of ballots excluding segregated ballots cast by persons whose names	605

appear on voter's list	
Number of segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	369
Number of ballots marked against applicant	234
Number of ballots segregated and not counted	17

0294-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. 1103398 Ontario Inc. (Respondent)

Unit: "all employees of 1103398 Ontario Inc. in the City of Greater Sudbury, save and except forepersons and persons above the rank of foreperson and office staff" (17 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

0300-06-R: Christian Labour Association of Canada (Applicant) v. Tomlinson Environmental Services Ltd. (Respondent)

Unit: "all residential municipal waste collection drivers/loaders employed by Tomlinson Environmental Services Ltd. in the City of Ottawa, save and except supervisors, those above the rank of supervisor, office and clerical staff, students employed during any school vacation period" (5 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0333-06-R: Niagara Health Care & Service Workers Union Local 302, affiliated with the Christian Labour Association of Canada (Applicant) v. The Orchards Retirement Residence (Respondent)

Unit: "all employees of the employer at its Retirement Residence in Vineland, ON, save and except Office and Clerical Employees, Business Manager, Director of Care, Supervisors and those persons above the rank of Supervisor" (20 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	11

0373-06-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the County of Lennox & Addington (Respondent)

Unit: "all paramedics employed by the Corporation of the County of Lennox and Addington in the County of Lennox and Addington, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements" (23 employees in unit) *(Having regard to the agreement of the parties.) (Clarity Note)*

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

0429-06-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the County of Grey operating as Grey Gables County Home for the Aged (Respondent) v. Canadian Health Care Workers (Intervenor)

Unit: "all employees of The Corporation of the County of Grey in its home or homes for the aged in the Town of Markdale, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff" (49 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	37
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	33
Number of ballots marked in favour of intervener	4
Number of ballots segregated and not counted	0

0430-06-R: Ontario Public Service Employees Union (Applicant) v. The Corporation of the County of Grey operating as Grey Gables County Home for the Aged (Respondent) v. Canadian Health Care Workers (Intervenor)

Unit: "all employees of The Corporation of the County of Grey in its home or homes for the aged in the Town of Markdale, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period" (24 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's lis	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked in favour of intervener	5
Number of ballots segregated and not counted	0

0445-06-R: Ontario Nurses' Association (Applicant) v. Ina Grafton Gage Home (Respondent)

Unit: "all Registered Nurses and Nurses with a temporary certificate of registration employed by Ina Grafton Gage Home in Toronto, save and except Infection Control Coordinator, Nurse Managers and persons above the rank of Nurse Manager." (15 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Subsequent to Vote

3328-05-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Ottawa Marriott Hotel (Respondent)

Unit #1: "all employees of the Ottawa Marriott Hotel employed at 100 Kent Street in the City of Ottawa in the guest services department, save and except managers, persons above the rank of manager and persons covered by any subsisting collective agreement" (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on	0

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

4293-05-R: York University Staff Association (Applicant) v. York University Respondent)

Unit: "all employees of York University employed in Organized Research Units, save and except managers, persons above the rank of manager, and employees covered by a subsisting collective agreement." (100 employees in unit)

Number of names of persons on revised voters' list	302
Number of persons who cast ballots	123
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	82
Number of segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names do not appear on voters' list	6

0055-06-R: United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Applicant) v. Noorani Holdings Limited (Respondent)

Unit: "all Hotel employees of Noorani Holdings Ltd. in the Town of Milton, save and except supervisors, and managers and those above the rank of supervisor and manager, sales, office and clerical staff, and accounting." (10 employees in unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

0177-06-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Connectivity Communication Services Canada Corporation, a subsidiary of IgeaCare Systems Inc. (Respondent)

Unit: "all journeyman and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of Connectivity Communication Services Canada Corporation, a subsidiary of IgeaCare Systems Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeyman and apprentice electricians, journeymen and apprentice linemen, journeymen and apprentice network cabling specialists and communication installers in the employ of Connectivity Communication Services Canada Corporation, a subsidiary of IgeaCare Systems Inc. in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	13
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	8

0187-06-R: Canadian Union of Public Employees (Applicant) v. Covenant House (Toronto) (Respondent)

Unit: "all employees employed at Covenant House (Toronto) in Metropolitan Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, ombudsperson and employees employed in marketing and human resources." (90 employees in unit)

Number of names of persons on revised voters' list	159
Number of persons who cast ballots	126
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	78
Number of segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

0260-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Ottawa Valley Waste Management Board (Respondent)

Unit: "all employees of Ottawa Valley Waste Recovery Centre in the Township of Laurentian Valley, save and except Supervisors, and those above the rank of Supervisor, office, clerical and sales staff, security guard, and janitor" (21 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	4

0273-06-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Ontario Lottery and Gaming Corporation c.o.b. as Mohawk Racetrack Slots (Respondent)

Unit: "all employees of the Ontario Lottery and Gaming Corp. at the Mohawk Raceway Slots in the City of Campbellville, save and except supervisors, persons above the rank of supervisor, office, clerical, security and surveillance staff" (192 employees in unit)

Number of names of persons on revised voters' list	192
Number of persons who cast ballots	148
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	135
Number of segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names do not appear on	3

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	79
Number of ballots segregated and not counted	9

0403-06-R: U.F.C.W. Local 333 (Applicant) v. 3576671 Canada Inc. c.o.b. Michael Seltzer's Le Biftheque (Respondent)

Unit: "all employees of 3576671 Canada Inc. c.o.b. Michael Seltzer's Le Biftheque located at 96 Richmond Street West, Toronto, Ontario M5H 3K6, save and except supervisors, persons above the rank of supervisor, office, clerical and purchasing staff, accounting staff and students employed during the school vacation period." (52 employees in unit)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	51
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	2

Applications for Certification Withdrawn

3073-04-R; 3181-04-R: Labourers' International Union of North America, Local 493 (Applicant) v. Poeta Contracting (Respondent)

4389-04-R: Teamsters International Union, Local 847, AFL-CIO-CLC (Applicant) v. A.S.P Incorporated (Respondent)

4291-05-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 (Applicant) v. GMS General Maintenance Services (Respondent) v. Construction Workers Local 53 affiliated with Christian Labour Association of Canada (Intervenor)

0006-06-R: United Brotherhood of Carpenters and Joiners of America, Local 1256 (Applicant) v. GMS General Maintenance Services (Respondent) v. Construction Workers Local 53 affiliated with Christian Labour Association of Canada (Intervenor)

0088-06-R: The Canadian Union of Public Employees (Applicant) v. Arthur Paulson Cleaning Services (Respondent)

0327-06-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Highrise Window Technologies Inc. (Respondent) v. United Brotherhood of Retail, Food, Industrial & Service Trades International Union (Intervenor)

0361-06-R: Canadian Union of Public Employees (Applicant) v. Kawartha Child Care Services (Respondent)

0420-06-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Omni Facility Services Canada Corp. (Respondent)

0422-06-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Nick Iori and Steve Gramolini c.o.b. as Whitmore Drywall (Respondent)

0571-06-R: Canadian Union of Public Employees (Applicant) v. Durham Region Board of Education (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2135-04-R: The United Food and Commercial Workers International Union, Local 175 (Applicant) v. Dorr Foods, and, Maple Leaf Meats Inc. (Respondents) *(Withdrawn)*

2456-04-R: Teamsters International Union, Local 847 (Applicant) v. Group 4 Falck (Canada) Limited, A.S.P. Incorporated and, Greater Toronto Airports Authority (Respondents) *(Withdrawn)*

3295-05-R: Teamsters Local Union No. 879 (Applicant) v. Metal One Canada Corporation and, Monzen Steel Inc. (Respondents) *(Dismissed)*

4218-05-R: United Steelworkers, Local 1-2693 (Applicant) v. Bowater Incorporated; Bowater Canadian Forest Products Inc.; and/or Bowater Canadian Forest Products Inc., Thunder Bay Woodlands (Respondent) *(Withdrawn)*

SALE OF A BUSINESS

2135-04-R: The United Food and Commercial Workers International Union, Local 175 (Applicant) v. Dorr Foods, and, Maple Leaf Meats Inc. (Respondents) *(Withdrawn)*

2456-04-R: Teamsters International Union, Local 847 (Applicant) v. Group 4 Falck (Canada) Limited, A.S.P. Incorporated and, Greater Toronto Airports Authority (Respondents) *(Withdrawn)*

3410-05-R: Metal One Canada Corporation (Applicant) v. Teamsters Local Union No. 879 (Respondent) *(Dismissed)*

3913-05-R: Thunder Bay District Housing Corporation (Applicant) v. International Brotherhood of Electrical Workers, Local 339 and, Canadian Union of Public Employees, Local 87 (Respondents) *(Granted)*

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

0132-06-R: Canadian National Federation of Independent Unions (Applicant) v. Independent Aluminum Workers' Union, Bruin Engineered Parts Inc. (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2985-02-R: Carlo Gutta (Applicant) v. Teamsters' Local Union 230, Ready Mix Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Respondent) v. Magine Inc. (Intervenor) *(Dismissed)*

Unit #1: "all truck drivers in the employ of Magine Inc. in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of segregated ballots cast by persons whose names appear on voter's list	9

Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	1
Number of names of persons on revised voters' list	13
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

4276-04-R: Michael McLellan (Applicant) v. Ontario Public Service Employees Union, Local 278 (Respondent) v. Ontario Lottery and Gaming Corporation c.o.b. as The Slots at Fort Erie Racetrack (Intervenor) *(Granted)*

Unit: "all Security employees of the Slots at Fort Erie Racetrack in the town of Fort Erie, save and except supervisors, dual rates and persons above the rank of supervisor, surveillance officers, and office and clerical staff." (53 employees in unit)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	23
Number of ballots marked against respondent	25
Number of ballots segregated and not counted	0

0364-06-R: Stephanie Anderson (Applicant) v. O.F.H.C.W. Local 1110 (Respondent) v. Saint Elizabeth Health Care (Intervenor) *(Dismissed)*

Unit: "all Registered Practical Nurses and Graduate Practical Nurses engaged in a nursing capacity by Saint Elizabeth Health Care - Durham Region in the Regional Municipality of Durham, save and except supervisors, persons above the rank of supervisor, office and clerical employees." (24 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	12
Number of ballots segregated and not counted	0

0509-06-R: The Employees of All Seasons Equipment (Applicant) v. Sheet Metal Workers' International Association Local Union 540 (Respondent) v. Esko Equipment Manufacturing Ltd. o/a All Seasons Equipment (Intervenor) *(Granted)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0620-06-U: Amalgamated Transit Union, Local 113 (Applicant) v. Toronto Transit Commission (Respondent) *(Dismissed)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3698-02-U: Magine Inc. (Applicant) v. Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers and Frank Ferreira (Respondent) *(Terminated)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3817-02-U: Teamsters' Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Magine Inc. (Respondent) v. Carlo Gutta (Intervenor) *(Terminated)*

0840-03-U: Labourers' International Union of North America, Local 527 (Applicant) v. Malyon Excavation Limited (Respondent) *(Withdrawn)*

4038-03-U: Labourers' International Union of North America (Applicant) v. Central Ontario Regional Council of Carpenters, Drywall and Allied Workers, United Brotherhood of Carpenters and Joiners of America, and, Azor Woodworking Ltd. (Respondents) *(Withdrawn)*

0818-04-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Respondent) *(Withdrawn)*

1115-04-U: Dana Horochowski (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) v. The York Catholic District School Board (Intervenor) *(Dismissed)*

2648-04-U: Victor Grange (Applicant) v. Communications, Energy & Paperworkers Union, Local 1701 (Respondent) *(Dismissed)*

2686-04-U: Teamsters International Union, Local 847 (Applicant) v. A.S.P. Incorporated (Respondent) *(Withdrawn)*

3138-04-U: Communications, Energy and Paperworkers Union, Local 87-M (Southern Ontario Newsmedia Guild) (Applicant) v. Brabant Newspapers, A Division of Citymedia Group Inc., Hamilton Printing Group Inc., A Division of Citymedia Group Inc. (Respondents) *(Withdrawn)*

3243-04-U: Andrew Birnie, Dana Severn, David Young (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 222 (Respondent) v. ACSYS Automotive Component Systems of Canada A Division of BBK, Michigan (Intervenor) *(Dismissed)*

3244-04-U; 3271-04-U: Labourers' International Union of North America, Local 493 (Applicant) v. Poeta Contracting (Respondent) *(Withdrawn)*

3569-04-U; 3771-04-U: Amalgamated Transit Union, Local 1587 (Applicant) v. Miller Transit Limited (Respondent) *(Withdrawn)*

3609-04-U: United Food and Commercial Workers International Union, Local 333 (Applicant) v. Group 4 Falck (Canada) Limited (Respondent) *(Dismissed)*

4189-04-U: John Hebert (Applicant) v. Canadian Union of Public Employees and its Local 87 (Respondent) v. The Corporation of the City of Thunder Bay (Intervenor) *(Dismissed)*

0536-05-U: Donna Ferguson (Applicant) v. Canadian Health Care Workers Union (Respondent) v. Oakwood Retirement Communities Inc., operating as The Village of Transley Woods (Intervenor) *(Dismissed)*

0778-05-U: Chris Cadrin (Applicant) v. Canadian Auto Workers, Local 200 (Respondent) v. Ford Motor Company of Canada, Ltd. (Intervenor) *(Dismissed)*

0828-05-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Applicant) v. Windsor Airline Limousine Services Limited (Respondent) *(Withdrawn)*

0840-05-U: Stephane Verreault (Applicant) v. Teamsters Local Union 419 (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 787) (Intervenor) *(Dismissed)*

0973-05-U: Jennifer Rai (Botelho) (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) and Its Local 414 (Respondent) v. The Great Atlantic and Pacific Company of Canada Limited (Intervenor) *(Withdrawn)*

1126-05-U: Rudi Barrese (Applicant) v. United Food Commercial Workers Canada, Locals 175 & 633 (Respondent) *(Withdrawn)*

1444-05-U: Jill Darnell (Applicant) v. Canadian Union of Public Employees, Local 126 (Respondent) v. City of Peterborough (Intervenor) *(Terminated)*

2066-05-U: Kathy Elliott (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Allied Industrial Services Workers International Union (formerly United Steelworkers of America) (Respondent) *(Dismissed)*

2197-05-U: Rose Johnson (Applicant) v. C.U.P.E. Local 5001 (Respondent) v. University Health Network (Intervenor) *(Dismissed)*

2278-05-U: Marylin Robinson (Applicant) v. The Canadian Union of Public Employees, Local 1766 (Respondent) v. The Children's Aid Society of Haldimand & Norfolk (Intervenor) *(Dismissed)*

2396-05-U: Pierre Beaulieu (Applicant) v. C.A.W. Local 4518 (Respondent) *(Dismissed)*

2886-05-U: Hollie Hladysh (Applicant) v. CAW Local 302 (Respondent) v. Groves Memorial Community Hospital (Intervenor) *(Dismissed)*
3010-05-U: Annette Janke (Applicant) v. Ontario Public Service Employees Union and its Local 459 (Respondent) *(Dismissed)*

3071-05-U: Dwayne Maye (Applicant) v. Economy Paving Association (Respondent) v. Grant Imbeau (intervenor) *(Dismissed)*

3356-05-U: Cathy Smith (Applicant) v. Service Employees International Union, Local 1.on (Respondent) v. The Corporation of Norfolk County (Norview Lodge) (Intervenor) *(Dismissed)*

3430-05-U: Mark Lapum (Applicant) v. Amalgamated Transit Union, Local 1587 (Respondent) v. Greater Toronto Transit Authority (hereinafter, "Go Transit") (Intervenor) *(Withdrawn)*

3528-05-U: Armand Dutrisac (Applicant) v. CAW Local 222 (Respondent) v. TDS Automotive Logistics (Intervenor) *(Dismissed)*

3541-05-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loyal Order of Moose Lodge #844 (Respondent) *(Withdrawn)*

3582-05-U: Karen Mary Kenney (Applicant) v. CAW Local 444 (Respondent) *(Withdrawn)*

3590-05-U: Kemisha Jackson (Applicant) v. Canadian Health Care Workers (Respondent) v. Oakwood Retirement Communities Inc. operating as The Village of Humber Heights (Intervenor) *(Withdrawn)*

3610-05-U: Gerry Philippe (Applicant) v. Toronto Civic Employees' Union, Local 416, Canadian Union of Public Employees (Respondent) v. City of Toronto (Intervenor) *(Dismissed)*

3630-05-U: Marek Leszczynski (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 127 (Respondent) v. Woodbridge Foam Corporation (Intervenor) *(Withdrawn)*

3650-05-U: Zandra Jacob (Applicant) v. Service Employees International Union Local 2.on Brewery, General and Professional Workers Union (Respondent) v. Participation House (Intervenor) *(Dismissed)*

3677-05-U: United Food & Commercial Workers Canada Locals 175 & 633 (Applicant) v. Norfoam Ltd. (Respondent) *(Withdrawn)*

3720-05-U: United Steelworkers, Local 1-2693 (Applicant) v. Bowater Canadian Forest Products Inc., Thunder Bay Woodlands (Respondent) *(Withdrawn)*

3795-05-U: Richard Baltzer (Applicant) v. G & R Cold Forging Inc. (Respondent) *(Dismissed)*

3822-05-U: Razaw Nadir (Applicant) v. UNITE HERE Canada (Respondent) v. WoodGreen Community Services of Toronto (Intervenor) *(Withdrawn)*

3867-05-U: Earnold Rueben (Applicant) v. United Food and Commercial Workers International Union, Locals 175 & 633 (Respondent) v. Quality Meat Packers Ltd. (Intervenor) *(Dismissed)*

3876-05-U: Antonella Serratore (Applicant) v. Christian Labour Association of Canada (Respondent) *(Withdrawn)*

3880-05-U: Michael P. Bradt (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervenor) *(Dismissed)*

3895-05-U: Kimberley A. MacIntosh (Applicant) v. Ontario Nurses Association and Brockville Psychiatric Hospital, a Division of Royal Ottawa Health Care Group (Respondent) *(Withdrawn)*

3974-05-U: Wayne Anderson (Applicant) v. CAW, Local 707 (Respondent) v. Ford Motor Co. of Canada Limited (Intervenor) *(Withdrawn)*

4098-05-U: Brett Graves (Applicant) v. United Food and Commercial Workers Canada Locals 175 & 633 (Respondent) *(Dismissed)*

4136-05-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Mudges (E.) Appliance & Service Shop (Wharncliffe) (Respondent) *(Withdrawn)*

4142-05-U: Gerald Dicaire (Applicant) v. SEIU, Local 528 (Respondent) *(Withdrawn)*

4156-05-U: Canadian Union of Public Employees and its Local 4709 (Applicant) v. Northview Nursing Home (Respondent) *(Withdrawn)*

4161-05-U: Fabian Alexander Nicholson (Applicant) v. Local 252 CAW (Respondent) *(Withdrawn)*

4221-05-U; 4238-05-U: AVW-Telav Inc. (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) *(Withdrawn)*

4305-05-U: Myron Lampitt (Applicant) v. Teamster's International Union, Local 879 (Respondent) v. Dufferin Concrete (Intervenor) *(Withdrawn)*

0003-06-U: Richard Lane (Applicant) v. Service and Commercial Employees' Union, Local 272 (Respondent) *(Withdrawn)*

0024-06-U: Stephan Carrier (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) Local 1859 (Respondent) *(Withdrawn)*

0038-06-U: Qasim M. Virk (Applicant) v. Sheet Metal Workers' International Association Local 540 (Respondent) *(Dismissed)*

0048-06-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 (Applicant) v. Cara Operations Limited and Airport Services (Respondent) *(Withdrawn)*

0097-06-U: John Batten (Applicant) v. United Steelworkers of America Local 08773 District 06E (Respondent) *(Withdrawn)*

0115-06-U: Errol Higgins (Applicant) v. United Steelworkers of America, District 6 (Respondent) *(Withdrawn)*

0161-06-U: Canadian Union of Public Employees (Applicant) v. Arthur Paulson Cleaning Services (Respondent) *(Withdrawn)*

0162-06-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (Applicant) v. Harmony Logistics Inc. (Respondent) *(Withdrawn)*

0188-06-U: Canadian Union of Public Employees (Applicant) v. Covenant House (Toronto) (Respondent) *(Withdrawn)*

0314-06-U: United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Applicant) v. Noorani Holdings Limited (Respondent) *(Withdrawn)*
0324-06-U: Nikola Popovic (Applicant) v. Amalgamated Transit Union Local 1587 (Respondent) v. Greater Toronto Transit Authority (hereinafter, "Go Transit") (Intervenor) *(Withdrawn)*

0344-06-U: 6364414 Canada Inc. c.o.b. ICI Construction Management (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 93, The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Respondents) *(Withdrawn)*

0416-06-U; 0417-06-U: Rusty Barron (Applicant) v. Cupe Local 1734 (Respondent) *(Terminated)*

0434-06-U: Carlos Paiva (Applicant) v. Teamsters International Union Local 847 (Respondent) *(Dismissed)*

APPLICATION FOR INTERIM ORDER

1914-05-M: Stephane Verreault (Applicant) v. Teamsters Union Local 419 (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 787) (Intervenor) *(Terminated)*

0226-06-M: Sodexho MS Canada Limited (Applicant) v. Retail, Wholesale & Department Store Union District Council of the United Food and Commercial Workers International Union (Respondent) *(Withdrawn)*

0346-06-M: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Inteleservices Canada Inc. (Respondent) *(Granted)*

0418-06-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Mudges (E.) Appliance & Service Shop (Wharncliffe) (Respondent) *(Withdrawn)*

0481-06-M: Teamsters Local Union 938 (Applicant) v. Ontario Lottery and Gaming Corporation (Point Edward Charity Casino) (Respondent) *(Granted)*

APPLICATIONS FOR CONSENT TO PROSECUTE

3719-05-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 1-1000 (Applicant) v. 1229026 Ontario Inc., c.o.b. as Place Mont Roc (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

4435-04-JD: Labourers' International Union of North America, Local 493 (Applicant) v. Greater Ontario Regional Council of Carpenters Drywall and Allied Workers, on behalf of Local 2486, United Brotherhood of Carpenters and Joiners of America and, Deep Foundations Contractors, Buttcon Limited (Respondents) *(Dismissed)*

1055-05-JD: United Steelworkers of America Local 2020 (Applicant) v. Falconbridge Limited Sudbury Operations, Sudbury Mine, Mill and Smelter Workers' Local 598 CAW (Respondents) *(Dismissed)*

0478-06-JD: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. EKT 90 Inc., Millwrights Local Union 1151 (Respondents) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1560-02-M: Greater Essex County District School Board (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4219-04-OH: Yan Gam (Applicant) v. AGAT Laboratories (Respondent) *(Withdrawn)*

0881-05-OH: Peter Reed (Applicant) v. Torbear Contracting Inc., John Fox (Respondent) v. Black & McDonald (Intervenor) *(Dismissed)*

3240-05-OH; 3241-05-OH: Alexis Williams (Applicant) v. North American Construction 1993 Ltd., Mike Brazeau (Respondent); Alexis Williams (Applicant) v. North American Construction 1993 Ltd., Nick Donn (Respondent) *(Terminated)*

3272-05-OH: Robert Moreau (Applicant) v. Ministry of Community Safety and Correctional Services (Respondent) *(Dismissed)*

3680-05-OH: Richard Moore (Applicant) v. Milkha Singh (Respondent) *(Dismissed)*

3866-05-OH: Earnold Rueben (Applicant) v. Quality Meat Packers Ltd. (Respondent) v. United Food and Commercial Workers International Union, Locals 175 & 633 (Intervenor) *(Dismissed)*

3892-05-OH: Wayne Irvin (Applicant) v. The Griffin Corporation (Respondent) *(Withdrawn)*

4028-05-OH: Denis Theriault (Applicant) v. Labour Ready (Respondent) *(Withdrawn)*

4101-05-OH: Theresa Shand (Applicant) v. 3353729 Canada Inc./Tim Hortons (Respondent) *(Withdrawn)*

4140-05-OH: Keegan DeSouza (Applicant) v. Thomas Wong (Respondent) *(Withdrawn)*

0074-06-OH: Terry Barlow (Applicant) v. Premm Metal Products Inc./Mobile Thermo Systems (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

1421-03-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (Applicant) v. Adam Clark Company Limited (Respondent) *(Dismissed)*

3596-03-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Walter Gradascevic c.o.b. City Interior Contracting and Vahid Gradascevic c.o.b. City Interior Construction (Respondent) *(Granted)*

1107-05-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Mold-Tech Electrical Services Inc., CWP Packaging Limited c.o.b. as Industrial Concepts Services (Respondents) *(Granted)*

2559-05-G; 2591-05-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Black & McDonald Ltd. (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 128, Electrical Power System Construction Association *(Intervenors)*; Sheet Metal Workers' International Association, Local 30 (Applicant) v. Black & McDonald Ltd. (Respondent) v. Electrical Power System Construction Association (Intervenor) *(Withdrawn)*

4010-05-G: Labourers' International Union of North America, Local 493 (Applicant) v. R.M. Belanger Limited (Respondent) *(Withdrawn)*

4036-05-G: International Union of Bricklayers and Allied Craftworkers, Local 29 (Applicant) v. Reftec Inc. (Respondent) *(Terminated)*

4106-05-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Da Silva c.o.b. as JD Installations (an unregistered business name) (Respondent) *(Withdrawn)*

4121-05-G: Construction Workers Union Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. DC Corex Construction Ltd. (Respondent) *(Withdrawn)*

4188-05-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Murray Scholten o/a M & J Tile (An Unregistered Business Name) (Respondent) *(Granted)*

4281-05-G: United Brotherhood of Carpenters and Joiners of America Local 397 (Applicant) v. Edward Wayne Baxter, Michael John Baxter, Kevin James Baxter and Steven Glenn Baxter c.o.b. as Baxter Installations (Respondent) *(Granted)*

0062-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Westwood Drywall Inc. (Respondent) *(Granted)*

0193-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Bloomington Painting & Decorating Ltd. (Respondent) *(Endorsed Settlement)*

0194-06-G: International Union of Bricklayers and Allied Craftworkers, Local 7 (Applicant) v. Arban Terrazzo Tile and Marble Ltd. (Respondent) *(Granted)*

0209-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Superior Stucco and Drywall Inc. (Respondent) *(Granted)*

0225-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Northstar Wall Systems Inc. (Respondent) *(Granted)*

0252-06-G: Sheet Metal Workers' International Association, Local Union 235 (Applicant) v. Spada Sheet Metal (Respondent) *(Endorsed Settlement)*

0257-06-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Douglas Crump Electrical Services Inc. (Respondent) *(Endorsed Settlement)*

0261-06-G: Drywall Acoustic Lathing and Insulation, Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Regency Drywall & Acoustics Systems Inc. (Respondent) *(Granted)*

0262-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. T A Enterprise Inc. (Respondent) *(Withdrawn)*

0263-06-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mose Drywall Systems Ltd. (Respondent) *(Terminated)*

0286-06-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. 1561908 Ontario Inc. c.o.b. as Commercial Construction Ontario and, Rodney Capstick (Respondents) *(Endorsed Settlement)*

0297-06-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. D's Carpentry Ltd., also known as Khalil Deeb. c.o.b. as D's Carpentry (Respondent) *(Withdrawn)*

0313-06-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Walls.Com (Respondent) *(Endorsed Settlement)*

0329-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Metro Painters (2004) Limited (Respondent) *(Granted)*

0334-06-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dynamic Fixtures and Installations Ltd. (Respondent) *(Granted)*

0355-06-G: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Target Painting Inc. (Respondent) *(Granted)*

0379-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers Local 765 (Applicant) v. Jervis B. Webb Company of Canada Ltd. (Respondent) *(Withdrawn)*

0381-06-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Perfect Painting & Wall Covering Inc. (Respondent) *(Granted)*

0401-06-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. CIR Painting & Industrial Coatings Ltd. (Respondent) *(Granted)*

0424-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Starwest Plaster Inc. (Respondent) *(Granted)*

0452-06-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 3087-2618 Quebec Inc. (Respondent) *(Withdrawn)*

0466-06-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. The Royal Stucco Ltd. (Respondent) *(Granted)*

0468-06-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. Associated Painting Limited (Respondent) *(Granted)*

0491-06-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Brent Robert O'Quinn c.o.b. as Brecon Construction (Respondent) *(Withdrawn)*

0502-06-G: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Bob Seabrook Construction Limited (Respondent) *(Granted)*

0612-06-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. 1257132 Ontario Ltd. o/a PM Designs (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

3037-02-ES: Oracle Corporation Canada Inc. (Applicant) v. Michel Delmar and, Ministry of Labour (Respondents) *(Withdrawn)*

2001-03-ES: Ibrahim Saad (Applicant) v. Bookham (Canada) Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2761-04-ES: Optimum Information Systems Inc. (Applicant) v. Robert Clark and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3369-04-ES: Al Mesihovic (Applicant) v. 1298781 Ont. Inc. o/a Lansdowne Property Management and, Director of Employment Standards (Respondents) *(Dismissed)*

3518-04-ES: Chris Leger (Applicant) v. Land O'Lakes Tourist Association and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3974-04-ES: Alves Auto Centre a Division of Kirk Alves Transportation Ltd. (Applicant) v. Brenda Kingshott, Director of Employment Standards (Respondents) *(Dismissed)*

4261-04-ES: Mr. Mohamed Ahmed (Applicant) v. National Importers Canada Ltd. , Director of Employment Standards (Respondents) *(Dismissed)*

0066-05-ES: John Ian Lee Operating as Jonlee Construction (Applicant) v. Ralph Henning, Director of Employment Standards (Respondents) *(Dismissed)*

0088-05-ES: Clint Ellis (Applicant) v. Hemisphere Freight & Brokerage Services Inc. and, Director of Employment Standards (Respondents) *(Terminated)*

0986-05-ES; 1041-05-ES: 1363814 Ontario Limited o/a Waubaushene Truck Stop (Applicant) v. Director of Employment Standards (Respondent); 1363814 Ontario Limited o/a Waubaushene Truck Stop (Applicant) v. Ashley Brownridge , Diane Cain, Amanda Hadley, Deborah Hadley, Crystal Irwin, Sandra Therrien, Beverly Watson, Christine Corbett and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1056-05-ES: Anna Gallinger (Applicant) v. The Redrock Sports Bar & Grill Inc. operating as Don Michaels Restaurant and Bar and, Director of Employment Standards (Respondents) *(Granted)*

1158-05-ES: Maria Metallo (Applicant) v. Merrett's Pharmacy Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1643-05-ES: Andrew Pollock and Andrea Anderson, Directors (Applicant) v. Ted Somes and, Emily Doyle and, Josh McGarrett and, Julie Wegerich and, Director of Employment Standards (Respondents) *(Dismissed)*

1745-05-ES: 1511975 Ontario Inc. o/a as Mac's Convenience Store Inc. (Applicant) v. Director of Employment Standards (Respondent) *(Granted)*

2128-05-ES: Platinum Construction (Applicant) v. Sergio Flumiani, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2285-05-ES: Denise Parchment and (Applicant) v. Bola Abimbola a Director of Batotech Inc., Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2339-05-ES: A.C.I.C. Ltd. (Applicant) v. Anita Jeffery, and, Director of Employment Standards (Respondents) *(Granted)*

2347-05-ES: Neil Prime (Applicant) v. Wescan Systems Limited, Director of Employment Standards (Respondents) *(Dismissed)*

2905-05-ES: Canadian Industrial Publishing Inc. (Applicant) v. Kathryn Dunmore, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3005-05-ES: Turkstra Lumber Company Ltd. (Applicant) v. Gord Fish and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3094-05-ES: Colonnade Pizza Kanata 4054644 Canada Inc. (Applicant) v. Janine Frechette and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3164-05-ES: Antonio Leo (Applicant) v. The Boulevard Club("The Club") and, Director of Employment Standards (Respondents) *(Dismissed)*

3193-05-ES: Francesca Forte (Applicant) v. Kerr Bros. Limited and, Director of Employment Standards (Respondents) *(Withdrawn)*

3213-05-ES: Robert Keys (Applicant) v. Isabel Management Corporation and, Director of Employment Standards (Respondents) *(Dismissed)*

3227-05-ES: Arctic Packaging Industries Inc. (Applicant) v. Terry Wynbergen and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3339-05-ES: Meena Hotel-Motel Maintenance & Management Ltd. o/a Hwy 7 West Motel (Applicant) v. Jamal Rabeha, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3345-05-ES: Schaeffler Canada Inc. (Applicant) v. Susan Carty and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3382-05-ES: Lai Kam Luck (Applicant) v. Progressive Apparel Manufacturing (Div. of 786 Distributors Inc.) and, Director of Employment Standards (Respondents) *(Terminated)*

3400-05-ES: Frank Villella (Applicant) v. Chubb Security Systems – a division of CSG Security Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3428-05-ES: City View Platers Inc. (Applicant) v. Ande Kibrom Yamane, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3429-05-ES: Andy Crown Company Limited (Applicant) v. Dari Uddin and, Director of Employment Standards (Respondents) *(Withdrawn)*

3481-05-ES: Don Cramer (Applicant) v. Maljohn Co. Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3544-05-ES: 1472463 Ontario Inc. o/a Petro Canada (Applicant) v. Emily Ann Waters and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3596-05-ES: Tim Somers (Applicant) v. Casino Rama and, Director of Employment Standards (Respondents) *(Dismissed)*

3598-05-ES: Abingdon Meat Packers (Applicant) v. Daniel Love and, Director of Employment Standards (Respondents) *(Withdrawn)*

3614-05-ES: Keji Planners and Builders (Applicant) v. Neil Esterson and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3639-05-ES: Rexdale Custom Metal Finishers Limited (Applicant) v. Roopnarine Hansa and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3690-05-ES: Dennis Goodridge (Applicant) v. Tire World Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3706-05-ES: Safe-Way Human Resource Management Inc. (Applicant) v. Donald Pakkala and, Director of Employment Standards (Respondents) *(Dismissed)*

3728-05-ES: Unique Games Inc. (Applicant) v. Deanna Boynton and, Director of Employment Standards (Respondents) *(Dismissed)*

3739-05-ES: Gregory K. Post (Applicant) v. Craaytech Painted Plastics Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3796-05-ES: Cyrus Investments Inc. (Applicant) v. Hayat Wehbe and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3824-05-ES: 1381985 Ontario Inc. o/a Adpage (Applicant) v. Linda Brown, and, Director of Employment Standards (Respondents) *(Terminated)*

3828-05-ES: Alvina Ultronkie (Applicant) v. Madawaska Doors Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3848-05-ES: Nutek Computer Centre (145673 Ontario Limited) (Applicant) v. Gerald Marcotte and, Director of Employment Standards (Respondents) *(Dismissed)*

3854-05-ES: Melissa Merryweather (Applicant) v. Hanson Restaurants Ontario o/a Arby's and, Director of Employment Standards (Respondents) *(Withdrawn)*

3858-05-ES: Kevin Lacombe (Applicant) v. Ottawa Mould Craft Limited, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3890-05-ES: Sarafinchin Associates Ltd. (Applicant) v. Victor Kopetsky, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3924-05-ES: 1596309 Ontario Ltd. o/a Midtown Hotel (Applicant) v. Roberta Crewson and, Director of Employment Standards (Respondents) *(Dismissed)*

3934-05-ES: Royal Canadian Legion Branch 105 (Applicant) v. Betty Bissonnette and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3966-05-ES: Century 21 Leading Edge Realty Inc. (Applicant) v. Joyce Yuen and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3993-05-ES: Roy's Television & Radio Company Limited (Applicant) v. Bruno Lacasse and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*
4059-05-ES: Jennifer Graham (Applicant) v. 1603808 Ontario Limited o/a Mr. Sub and, Director of Employment Standards (Respondents) *(Withdrawn)*

4082-05-ES: Pauline Pregent (Applicant) v. Audrey Leclair o/a Memories Bar & Grill and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4083-05-ES: Angelo Mazza (Applicant) v. Highcraft Construction Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

4085-05-ES: Rayhaz Express Inc. (Applicant) v. Syed Moazzam Nazeer and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4095-05-ES: 1135196 Ontario Inc. (Applicant) v. Christopher Vandenberg and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4112-05-ES: Royce-Ayr Cutting Tools Inc. (Applicant) v. Teresa Smith and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4153-05-ES: Lennox Brown (Applicant) v. 1266094 Ontario Limited o/a Five Star Farms and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4159-05-ES ; 4160-05-ES: Lan-Con Construction 2000 Inc. (Applicant) v. Rafael Penado and, Director of Employment Standards (Respondents); Lan-Con Construction 2000 Inc. (Applicant) v. Ricardo Claros and, Director of Employment Standards (Respondents) *(Dismissed)*

4167-05-ES: McCleary Animal Hospital (Applicant) v. Agnieszka Cybulska-Cetera and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4172-05-ES: Stephen Aspro (Applicant) v. Besam Canada Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4173-05-ES: Royal Green Enterprises Ltd. (Applicant) v. Po-Ling (Shirley) Yeung and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4199-05-ES: Rosario Orrico (Applicant) v. Grimsby Custom Tooling Limited and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4202-05-ES: Zenon Kuczepa operating as Z. Kuczepa Painting (Applicant) v. Zdzislaw Kowalczuk and, Director of Employment Standards (Respondents) *(Dismissed)*

4203-05-ES: Gary Stairs (Applicant) v. 254880 Ontario Inc. o/a Bushwood Golf Club, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4204-05-ES: 2065678 Ontario Inc. o/a Joe Alfredo's Pasta & Grillhouse (Applicant) v. Jordan Roth and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4222-05-ES: Czarina Moosa (Applicant) v. Indo-Overseas Management Group Inc., and, Director of Employment Standards (Respondents) *(Dismissed)*

4255-05-ES: The DCS Graphics Group Inc. (Applicant) v. Tricia Adler and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4263-05-ES: The Fitzrichard Pub Inc. (Applicant) v. Jayn Wihlidal and, Director of Employment Standards (Respondents) *(Terminated)*

4282-05-ES: The Estate of Vincent DeVita, a director of CDA Industries Inc. (Applicant) v. William Affleck, Pervaiz Akhtar, Mark Alforte, Fernando Aripres, Feroz Azees, Walter Bailey , Visagaperumal Balakmar, Heeralall Bharat, Nehron Bharat, Gary Budgell, Glen Burke, Ross Burt, Ed Callen, Romulus Ciceu, Acucena S. Colbourne, Chris Colbourne, Raymond Colbourne, Tina Colbourne, Elmer Cruz, Jorge DaSilva, Maria DaSilva, Leon DeSousa, Naresh C. Dubey, Carlos Estrella, Daniel Fleming, Ibara Godinez, Aaron Guiden, Cleusa Harris, Rosa Hernandez , Matthew Hormec, Syed Jafri, Ronald Jones, Murugananthan Kanagasooriam, Ayube Khan, Kathy Laplante, Francois Leduc, Michael Liu, Leroy Lyttle, Jason MacKenzie, Calingo Manolo, Andrew Marshall, Sherrie McFetridge, Stephen McGrath, Dulberto Melo, Ali Menani, Ernestine Miller, Doreen Milne, Kenneth Milne, Ryan Muffty, Daniel A. Mullings, Sujanthy Murugananthan, Simon Nagy, Dubey Naresh, George Newans, Tammy Peddie, Basmir Popal, Vasantherathev Prajevirajah, Pirasanna Rajaratnam, Radeka Rambajue, Heather Redmond, Roland Reid, Christian Rodriguez, MacKenzie Rogers, Jeffrey Ruiz, Somasundararam Saravanabavamar, Conroy Satchell, Djamel Sayoud, Janice Schmitz, Gabriel Seca, Thusyanthan Sellathurai, Peter Sindyiannis, Ronald Singh, Nagulanathan Sinnathuri, Kanthamalar Sritharan, Wieslawa Stachowicz, Pathmanathan Subramaniam, Thevathasan Subramaniam, Yoganathan Subramaniam, Alberta Thompson, Gerald Tseng, Jean Tully, Waclaw Tyszkiewicz, Theresa Vardon, Pujendrathas Veerasingam, Sureshkumar Veerasingam, Manuel Vieira, Clena Vorobyova, Scott Wahay, Qing Feng Wang, Lloyd Williams, Stanley Wojtas, Zhi Cheng Xue, Shirin Zehtabfard, John Zumbovski, Mary Cashore, Director of Employment Standards (Respondents) *(Withdrawn)*

4283-05-ES: Monique Racette (Applicant) v. St. Joseph Print Group Inc. / Groupe d'imprimerie St. Joseph Inc. and, Directeur des normes d'emploi (Respondents) *(Withdrawn)*

4286-05-ES: Guang Yao Zheng (Applicant) v. Ambassador Chinese Cuisine Inc., and, Director of Employment Standards (Respondents) *(Dismissed)*

4287-05-ES: NF Polybag (1992) Limited (Applicant) v. Suk Yin Ho and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4300-05-ES: Steve Gillett and Lori Gillett o/a Not Just Cuts (Applicant) v. Diane DaSilva and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0036-06-ES: Mohinder Singh Grewal (Applicant) v. Candor Plastics Co. - a division of Royal Group Technologies Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

0077-06-ES: Dr. Ayman Samra operating as Bridgeport Weber Dental Centre (Applicant) v. Wanda Holgate and, Director of Employment Standards (Respondents) *(Dismissed)*

0114-06-ES: Holy Cross Armenian Church (Applicant) v. Natalia Gaidoutskaia, and, Director of Employment Standards (Respondents) *(Terminated)*

0152-06-ES: Sheldon Morrison (Applicant) v. Value Village and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0185-06-ES: Paul Spracklin (Applicant) v. Precision Aero Components Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0235-06-ES: Don Kruzick (Applicant) v. Rod McKinnon Superior Industrial Linings and, Director of Employment Standards (Respondents) *(Dismissed)*

0391-06-ES: Lorri Lee Huyzers (Applicant) v. Guardsmark Canada Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*
0414-06-ES: Marcel Quenneville o/a Universal Builder (Applicant) v. Justine Robert and, Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

0517-03-HS: City of Toronto (Applicant) v. Canadian Union of Public Employees, Local 79, Ministry of Labour (Respondents) *(Terminated)*

1184-05-HS: Century Truss Canada (Applicant) v. Joint Health and Safety Committee Worker Representative, C. Grieg Archibald, Inspector (Respondents) *(Withdrawn)*

1283-05-HS: Ivaco Rolling Mills (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Joanne Noonan, Inspector (Respondents) *(Withdrawn)*

0084-06-HS: Active Team Inc. (Applicant) v. Shela Mirza, Inspector (Respondent) *(Dismissed)*

0480-06-HS: United Lumber & Building Supplies Co. Ltd (Applicant) v. Douglas West, Inspector (Respondent) *(Granted)*

0610-06-HS: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Laser Electric, Direct Energy and, Wendy Gobeil, Inspector (Respondents) *(Dismissed)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3856-03-ES: 277 St. George Street Limited o/a Nick Detoro Racing Stable (Applicant) v. Robert Backlund, Jennifer Baksh and, Director of Employment Standards (Respondents) *(Dismissed)*

1838-04-ES: D-Zign Interior Planning & Project Management Inc. (Applicant) v. Ana Laura Madariaga and, Director of Employment Standards (Respondents) *(Dismissed)*

3069-04-U: Iain Douglas (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Ministry of Community Safety and Correctional Services (Intervenor) *(Dismissed)*

2192-05-U: Winsome Wilson (Applicant) v. Canadian Union of Public Employees, Local 1590 (Respondent) v. Providence Healthcare (Intervenor) *(Dismissed)*

3587-05-U: Zahid Nawaz (Applicant) v. UFCW Local 333 (Respondent) *(Dismissed)*

3627-05-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. PRW Excavating Contractors Ltd. (Respondent) *(Dismissed)*

3879-05-G: Construction Workers Union Local 150 affiliated with the Christian Labour Association of Canada (Applicant) v. DC Corex Construction Ltd. (Respondent) *(Withdrawn)*

APPLICATIONS FOR ACCREDITATION

2013-05-R: Electrical Power Systems Construction Association (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Respondent) v. Brighton Beach Power Ltd. . The Construction Employers Coordinating Council of Ontario ("CECCO"), Mechanical Contractors Association Ontario, Brick and Allied Craft Union of Canada, Ontario Erectors Association Incorporated, Canadian Union of Skilled Workers, Labourers' International Union of North America, and Labourers' International Union of North America, Ontario Provincial District Council, International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers on its own behalf and on behalf of its affiliated Locals, Power Workers' Union, CUPE Local 1000 - C.L.C. *(Intervenors) (Withdrawn)*

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